Supreme Court, U.S.
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GRADY and LILLIE AUVIL, ROBERT and CHARLOTTE BRODY, BURT and ELLY CHESTNUT, BERT and EVELYN STENNES d/b/a Squaw Creek Ranch, Inc., and all other Washington red apple growers similarly situated,

Petitioners,

v.

CBS "60 MINUTES", a foreign corporation, and COLUMBIA BROADCASTING SYSTEM (CBS), a foreign corporation, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Counsel for Petitioners

Date: February 26, 1996

QUESTIONS PRESENTED

1. Is evidence that some scientific tests have failed to demonstrate that Alar causes cancer in humans, plus testimony from experts that there is no confirmed link between Alar and cancer in humans, sufficient evidence for plaintiffs in product disparagement action to withstand Fed. R. Civ. P. 56 summary judgment motion on question of falsity of media defendant's claim that Alar is "the most potent cancer-causing agent in our food supply?"

2. Must a defendant seeking summary judgment under Fed. R. Civ. P. 56 call to the court's attention the precise legal grounds for its motion before the burden shifts to the plaintiff to show the existence of a genuine issue of fact material to those legal grounds?

3. Does the First Amendment insulate a broadcast defendant in a product disparagement action from liability if all of the broadcast defendant's individual statements are true, even though the plaintiff demonstrates that the implied message of the broadcast taken as a whole is false?

PARTIES TO THE PROCEEDING AND RULE 29.1 LIST

Aside from the parties named in the caption, the following were Plaintiffs/Appellants in the Court of Appeals: Robert and Cathy Bernath; Harold and Lorraine Cox; Ferrell and Peggy Deen; Charles and Maxine Drake, d/b/a Frosty Red Orchard, Inc.; James Eddie, d/b/a Eddie Farms, Inc.; Paul Hudson; and Norman and Wanda Wilson. Petitioners do not anticipate that any of those individuals will be filing petitions for review of the Court of Appeals decision. Pursuant to Supreme Court Rule 12.4, those individuals/corporations should be deemed respondents in this action.

Aside from the Respondents listed in the caption, the following were listed as Defendants/Appellees in the Court of Appeals: Retlaw Enterprises, Inc., a corporation, d/b/a KIMA Television; Bonneville International Corporation, a corporation, d/b/a Kiro Television; and King Broadcasting Company, a corporation, d/b/a KREM Television. However, none of those corporations were actually parties in the Court of Appeals and none filed an appearance in that court. Two other corporations were Defendants/Appellants in the Court of Appeals: Natural Resources Defense Counsel, Inc., and Fenton Communications, Inc. On March 14, 1994, the Court of Appeals granted Petitioners' motion for voluntary dismissal of the appeal as to those two Defendants/Appellants.

Petitioners have no parent companies or nonwholly owned subsidiaries to list pursuant to Supreme Court Rule 29.1.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Grady and Lillie Auvil, Robert and Charlotte Brody, Burt and Elly Chestnut, and Bert and Evelyn Chestnut d/b/a Squaw Creek Ranch, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on October 2, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-16a) is reported at 67 F.3d 816. The opinion of the District Court granting summary judgment to Respondents on the issue of falsity (App. 19a-25a) is reported at 836 F. Supp. 740. The opinion of the District Court denying Respondents' motion to dismiss or for summary judgment on the issue of whether the television broadcast was "of or concerning" Petitioners or their products (App. 26a-55a) is reported at 800 F. Supp. 928.

JURISDICTION

The judgment of the Court of Appeals was entered on October 2, 1995. A timely petition for rehearing was denied on October 27, 1995. App. 17a-18a. On January 17, 1996, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including February 24, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The relevant provisions of the First Amendment to the United States Constitution and Rule 56 of the Federal Rules of Civil Procedure are set forth in the Appendix to this Petition. App. 56a-57a.

STATEMENT OF THE CASE

This Petition involves an effort by Washington State apple growers to recover damages in a product disparagement action brought against Respondent Columbia Broadcasting System (CBS) as a result of CBS's 1989 broadcast (on its "60 Minutes" newsmagazine show) of allegations that apples posed an imminent danger to public health. The broadcast alleged that a growth regulator then commonly applied to apples, daminozide (generally referred to by its trade name, Alar), causes cancer, and that children are particularly at risk. The District Court granted summary judgment for Respondents pursuant to Fed. R. Civ. P. 56, finding that Petitioners had failed to present evidence sufficient to create a genuine issue of material fact on the issue of whether the broadcast was false. App. 19a-25a. The Court of Appeals affirmed. App. 1a-16a.

Petitioners seek review of the decision to grant summary judgment. When considering motions for summary judgment, courts must view the facts and the inferences to be drawn from the underlying facts in the light most favorable to the opposing party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)(per curiam).

The "60 Minutes" piece in question, entitled "A is for Apple," aired nationwide on the CBS television network on February 26, 1989. The piece was highly critical of the then-common practice of applying Alar to apples in order to prevent pre-harvest fruit drop, promote color development, and increase storage life.[1] The piece twice dubbed Alar "[t]he most potent cancer-causing agent in our food

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[1] As the Court of Appeals recognized (App. 4a), the broadcast was based largely on a February 1989 article published by the Natural Resources Defense Council (NRDC) entitled, *Intolerable Risk: Pesticides in Our Children's Food.*

supply." App. 44a, 52a.[2] The piece went on to allege that Alar and other products "got on the market when we didn't know they were cancer-causing agents" (App. 46a); that "[w]e know that they do cause cancer" (*id.*); that one should "[g]o to the cancer ward at any children's hospital in this country. See these bald wasting-away kids. And then decide whether the risks [of Alar use] balance over the benefits" (App. 47a-48a); that "kids are at high risk from UDMH [unsymmetrical dimethyl hydrazine, Alar's breakdown chemical]" (App. 48a); that for children who drink significant amounts of apple juice, "[i]f those apples were treated with [Alar], the cancer risk is perilously high" (*id.*); that Alar is "a cancer-causing agent used on food that EPA knows is going to cause cancer for thousands of children over their lifetime" (*id.*); that "the FDA regulations or the FDA surveillance and the EPA regulations are not addressing the danger to children" (App. 50a); and that "[i]f EPA doesn't think that [Alar's status as] the most potent cancer-causing chemical in our food supply is grounds enough to declare an imminent hazard and remove it from food, well, I don't know what kind of risks it takes, then, to declare a chemical an imminent hazard" (App. 53a). The piece concluded with an assertion that the purchase of apple products was "supermarket roulette" because there was no way of knowing whether the products contained Alar. App. 55a. The "60 Minutes" piece underscored the alleged danger of Alar by opening with a visual image of a skull and crossbones (a well-recognized symbol for poison and death) emblazoned over a red delicious apple.

As the District Court found, "public reaction to the broadcast was dramatic and swift. Both sales and prices [of apples] fell sharply, not only locally, but world-wide."

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[2] A transcript of the "60 Minutes" piece was appended to the District Court's June 5, 1992 order. *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928, 937-941 (E.D. Wash. 1992). The transcript is reproduced in the Appendix at 45a-55a.

App. 28a. Apple sales did not recover until after Alar was taken off the market. In the interim, growers such as Petitioners and:

> [O]thers dependent upon apple production sustained tremendous losses amounting to perhaps as much as $75 million dollars. Beyond immediate economic loss, growers forced into bankruptcy or work-out arrangements with lenders lost their homes and livelihoods. Those who survived intact saw their property values nosedive. Entire communities dependent upon the apple market were thrown into depression.

Id.

Federal government officials responded by vigorously disputing the NRDC report and the "60 Minutes" piece. John Moore, acting deputy administrator of EPA, told a subcommittee of the House Agriculture Committee on March 2, 1989, "The public is being misled by the ominous rhetoric of the authors of the NRDC report." Moore said, "I believe the nation's food supply is safe," and that the NRDC's analysis of Alar relied on flawed animal studies. On March 16, 1989, three government agencies -- EPA, FDA, and the Department of Agriculture -- issued a joint statement that said in part, "The Government believes it is safe to eat apples." The joint statement said that there was no proof that Alar-treated apples constituted an imminent health hazard and that "the Federal Government encourages school systems and others responsible for the diets of children to continue to serve apples and other nutritious fruit to American children."

C. Everett Koop, then Surgeon General of the United States, responded to the "60 Minutes" piece on March 19, 1989 with the following statement: "I wish to send a message to mothers across the country, It's O.K. Mom, Apples are good for your kids!" In a May 11, 1989 letter to Uni-

royal Chemical Company (Alar's manufacturer), EPA set out its official position:

> We . . . see no reason either to destroy apples or apple products that may have Alar residues or to discontinue eating fresh fruits and vegetables. . . . [¶] We disagree strongly with recent reports appearing on television and in newspapers and magazines concerning the analysis developed by the . . . NRDC which created the impression that there is a massive and imminent public health problem as the result of pesticide residue in food, and particularly from Alar residues in apples and apple products. This is simply untrue.[3]

Petitioners responded to the "60 Minutes" piece by filing this product disparagement action on November 28, 1990. Twenty individuals joined as plaintiffs in the action, filed on behalf of themselves and 4,700 other Washington State apple growers.[4] Named as defendants were CBS, three of its network affiliates, NRDC, and Fenton Communications (a public relations firm hired by NRDC to publicize *Intolerable Risk*).[5] Petitioners alleged that the broadcast asserted that scientific evidence demonstrated conclusively that apples are an immediate hazard to public health because they cause cancer in children; and that that assertion was false. Among the specific statements that Petitioners asserted to be false were: (1) that Alar is "the

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[3] The quotations from Messrs. Moore and Koop and from EPA, FDA, and the Department of Agriculture are set forth in documents attached (as Exhibits 1, 3, 8, and 12) to Petitioners' opposition to CBS's motion for summary judgment.

[4] To date, the case has not been certified as a class action.

[5] Petitioners also listed "CBS '60 Minutes'" as an additional defendant, but there apparently is no separate corporate entity by that name.

most potent cancer-causing agent in our food supply"; (2) that EPA "knows" that Alar "is going to cause cancer for thousands of children over their lifetime"; and (3) that some children are going to develop Alar-induced cancer while still in their youth.

On June 5, 1992, the District Court dismissed claims against CBS's local affiliates on First Amendment grounds. App. 29a-32a. At the same time, the District Court denied CBS's motion to dismiss or for summary judgment, which CBS brought based on its contention that the "60 Minutes" piece was not "of and concerning" Petitioners or their products. App. 34a-39a. The court held that the broadcast was "of and concerning" all apples "whether treated with Alar or not." App. 39a. The District Court later dismissed all claims against NRDC and Fenton Communications, in an order dated June 18, 1992. *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 941 (E.D. Wash. 1992).

In July 1993, Respondent CBS filed a motion for summary judgment, on the ground that Petitioners could not meet their burden of demonstrating that the "60 Minutes" broadcast was false. Evidence submitted by Petitioners in opposition to the motion included the affidavits of five eminent scientists -- Drs. Robert E. Olson, Thomas W. Pendergrass, Joseph D. Rosen, Elizabeth M. Whelan, and Christopher Wilkinson -- each of whom supported Petitioners' contention that the broadcast was false.[6] Evidence submitted to the District Court through these expert affidavits included the following:

* There is no epidemiological evidence that Alar or UDMH is responsible for even a single human cancer,

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[6] Indeed, Petitioners believed that the evidence of falsity was so overwhelming that they filed their own motion for partial summary judgment, seeking a determination that falsity had been established as a matter of law. App. 20a.

even though Alar was widely marketed in this country for more than two decades (Wilkinson Aff. at 11; Pendergrass Aff. at 8).

* The evidence from animal studies is inconclusive regarding whether either Alar or UDMH is a rodent carcinogen, with many such studies finding no link at all between high dosages of those chemicals and tumors in laboratory animals (Wilkinson Aff. at 12; Whelan Aff. 7-8; Olson Aff. at 15).

* Studies that have reported a link between Alar/UDMH and tumors in laboratory animals are flawed (Wilkinson Aff. at 12; Olson Aff. at 9). A joint Food and Agricultural Organization (FAO)/World Health Organization (WHO) Expert Committee reviewed all existing animal studies in September 1989 (*after* the U.S. Alar scare had begun) and concluded that Alar is not an animal carcinogen (Olsen Aff. at 15). An expert panel convened by Great Britain's Ministry of Agriculture, Fisheries and Food reached the same conclusion in November 1989 (Wilkinson Aff. at 12).

* Even if it could be established that Alar and UDMH are rodent carcinogens, there is no basis for concluding that low dosages of those chemicals will cause cancer in humans, particularly in light of the absence of any epidemiological evidence linking Alar/UDMH with cancer (Olson Aff. at 8-9; Pendergrass Aff. at 13-14).

* Even accepting NRDC's and CBS's data as accurate, Alar is far from being "the most potent cancer-causing agent in our food supply." Humans regularly consume hundreds of naturally occurring pesticides that are far more carcinogenic than Alar and UDMH were alleged to be by CBS. For example, aflatoxin (which is present in peanut butter, among other foods) is universally considered to be far more carcinogenic than worst-case estimates for Alar and UDMH (Olson Aff.

at 8-9; Rosen Aff. at 8; Pendergrass Aff. at 12).

* EPA cancer risk assessments are theoretical worst-case scenarios that EPA readily acknowledges are, in all likelihood, very significant overestimations of risk. Accordingly, it is false to say that EPA "knows" that continued use of a suspected carcinogen will result in new cancer cases arising at rates theorized in its risk assessments (Wilkinson Aff. at 9; Olson Aff. at 15).

* Even though children may consume more apple products per unit of body weight than adults, there is no reason to conclude that children are in more danger than adults of contracting cancer from apples (Wilkinson Aff. at 14; Whelan Aff. at 8; Olson Aff. at 16; Rosen Aff. at 9).

* Cancer is a disease of old age. Childhood cancer is very rare, and even accepting NRDC's and CBS's data as accurate, there is no basis for concluding that Alar consumption by children will lead to increases in childhood cancer (Wilkinson Aff. at 14; Whelan Aff. at 8; Olson Aff. at 16; Rosen Aff. at 10; Pendergrass Aff. at 8).[7]

In an order dated September 13, 1993, the District Court denied Petitioners' motion for summary judgment and granted Respondents' motion for summary judgment. App. 19a-25a. The court said that it would be "inappropriate" to grant Petitioners' motion because:

> [E]ven the message of the broadcast is hotly contested. Since the court cannot find as a matter of law that the message of the broadcast is established, neither can it

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[7] For the Court's convenience, copies of the affidavits of Drs. Robert E. Olson and Christopher Wilkinson have been lodged separately with the Clerk of the Court.

judge the falsity of that message.

App. 20a.

For purposes of CBS's summary judgment motion, the District Court accepted Petitioners' contention that the "60 Minutes" broadcast conveyed three distinct messages: "(1) [Alar] is the most potent cancer-causing agent in our food supply; (2) [Alar] poses an imminent hazard and an unacceptable risk; and (3) [Alar] is most harmful to children." App. 22a-23a. The court held that none of those messages "can be proven as false." App. 23a.

With respect to the first message, the court acknowledged that Petitioners had presented evidence that "several" naturally occurring pesticides are far more potent carcinogens than Alar or UDMH but asserted that CBS's "most potent" statement nonetheless "could be true" because EPA had ranked UDMH as one of the most carcinogenic *synthetic* pesticides then on the market. *Id.* The court stated, "Since the CBS statement *could* be true, it cannot be proven false." *Id.* (emphasis added).

With respect to the second message, the district court said that CBS's assertion that Alar posed an imminent health hazard "is an ambiguous statement that could conceivably be true and plaintiffs are incapable of proving false." *Id.* The court did not address the falsity of CBS's assertion that EPA "knows" that Alar "is going to cause cancer for thousands of children over their lifetime."

With respect to the third message, the court acknowledged that Petitioners had "come forward with much evidence to the effect that there is no proof that [Alar] is more harmful to children." *Id.* The court nonetheless held that CBS was entitled to summary judgment on the issue because Petitioners had "not shown the CBS statement to be false"; rather, Petitioners had merely shown that there is a dispute among scientists "over whether [Alar] is more

harmful to children." *Id.*

In support of its decision to grant summary judgment to CBS on the issue of falsity despite its recognition that Petitioners had introduced some evidence that the "60 Minutes" broadcast was false, the District Court cited this Court's decision in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), which held that in a defamation action brought against a media defendant regarding issues of public concern, the plaintiff bears the burden of proving that the disputed statement is false. The court said that under *Hepps*, summary judgment for a media defendant is appropriate in a defamation/product disparagement action "where the evidence is ambiguous even viewing it in a light most favorable to the plaintiffs as the non-moving party." App. 22a.

The district court stated that under the standards advocated by Petitioners, CBS would have been required to perform an independent laboratory analysis of "the EPA report" before "issuing a public broadcast about that report"; the court said that a "news reporting service" should not be liable for damages in a product disparagement action when it simply "rel[ies] on a scientific government report" for purposes of "relaying the report's results." App. 24a-25a.[8]

The Ninth Circuit affirmed the District Court's dismis-

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[8] That portion of the District Court's order appears confused, since there was no EPA "report" upon which the "60 Minutes" broadcast was based. Although the broadcast mentioned a variety of EPA findings and actions with respect to Alar, it clearly did not "rely" on those findings and actions -- since the piece was highly critical of EPA for not taking immediate action to have Alar removed from the market. The report relied on by CBS was the NRDC report, which was highly critical both of EPA and the use of Alar on apples. The NRDC is not a government entity.

sal on October 2, 1995. App. 1a-16a. The Ninth Circuit said that it agreed with the District Court that "the growers have failed to raise a genuine issue of material fact as to the falsity of the broadcast." App. 4a.

The Ninth Circuit indicated that in order to establish the falsity of the "60 Minutes" broadcast, Petitioners would have to establish the falsity of EPA's *1992* finding that use of Alar/UDMH on apples should not be permitted because it posed an "unreasonable risk" of human cancer.[9] App. 11a-12a. The Ninth Circuit held that CBS was entitled to

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[9] EPA is authorized to assess pesticide risks and to prohibit use of a pesticide when its continued use poses an "unreasonable risk to man." Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136(bb), 136d(b). EPA began close scrutiny of Alar in the 1970s following initial reports in the scientific literature that UDMH was a potential rodent carcinogen. In 1985, the EPA Scientific Advisory Panel (SAP) looking into the issue concluded that existing studies were deficient and that there was insufficient evidence that Alar or UDMH were carcinogens to warrant regulatory action. Wilkinson Aff. at 10-12; Olson Aff. at 14. On February 1, 1989, EPA -- relying to a considerable extent on the animal studies that had been rejected by the SAP -- announced that it was beginning proceedings to revoke Alar's registration as of July 30, 1990. EPA had concluded that use of Alar posed a potential increased *lifetime* risk of 45 cancers per 1,000,000 exposed individuals; it concluded that immediate action against Alar was unwarranted, because the potential cancer risk through July 30, 1990 was less than one case per million exposed people. App. 12a n.8. Following the "60 Minutes" broadcast, Uniroyal voluntarily withdrew Alar from the market in the face of a torrent of public criticism. EPA subsequently determined that long-term use of Alar posed an "unreasonable risk" under FIFRA, albeit EPA cut in half its 1989 risk estimate. *See* 54 Fed. Reg. 47492 (1992). Whether lifetime exposure to a chemical constitutes a sufficiently "unreasonable risk" so as to justify revocation of its registration is, to a large extent, a political question about which regulators may reasonably disagree; EPA's definition of "unreasonable risk" is a theoretical lifetime risk of one cancer per 1,000,000 exposed individuals.

summary judgment because Petitioners had (according to the Ninth Circuit) failed to introduce evidence that EPA's conclusion (that use of Alar poses a potential lifetime risk of greater than one cancer per 1,000,000 exposed individuals) was false. App. 11a. The court acknowledged that Petitioners' experts had challenged the validity of animal studies that were the basis of NRDC's and CBS's claims; but the court held that such challenges were insufficient to withstand summary judgment because, as a matter of law, "[a]nimal laboratory studies are a legitimate means for assessing cancer risks to humans" and "can be relied upon." App. 10a-12a.

Regarding the "60 Minutes" claim that Alar poses an especial cancer risk to children and that "EPA knows [Alar] is going to cause cancer for thousands of children over their lifetime," the Ninth Circuit acknowledged that "no scientific study has been conducted on cancer risks to children from the use of pesticides," but said that CBS was entitled to summary judgment with respect to the falsity of this claim because "[t]he growers have provided no affirmative evidence that [Alar] does not pose a risk to children" and thus have provided "nothing to disprove [CBS's] conclusion that, if children consume more of a carcinogenic substance [per unit of body weight] than do adults, they are at a higher risk for contracting cancer." App. 13a.

Finally, the Ninth Circuit rejected Petitioners' contention that they should be permitted to demonstrate falsity by demonstrating the falsity of the overall implied message of the "60 Minutes" broadcast. App. 13a-15a. The Ninth Circuit said that the focus of a product disparagement action must be on the truth or falsity of individual statements contained in a challenged news account, not on the overall implied message of the news account; the cause of action must fail if no individual statement is shown to be false, without regard to any overall implied message alleged by the plaintiff. *Id.* The court held that a contrary rule would "raise[] the spectre of a chilling effect" (App.

15a) on First Amendment speech rights because it would create uncertainty regarding when journalists could be held liable for their words:

> Because a broadcast could be interpreted in numerous, nuanced ways, a great deal of uncertainty would arise as to the message conveyed by the broadcast. Such uncertainty would make it difficult for broadcasters to predict whether their work would subject them to tort liability.

Id. The Ninth Circuit's opinion did not directly address two of Petitioners' claims: that "60 Minutes" falsely stated that Alar is "the most potent cancer-causing agent in our food supply," and that Alar consumption by children will lead to increases in childhood cancer.

By order dated October 27, 1995, the Ninth Circuit denied Petitioners' motion for rehearing. App. 17a-18a.

REASONS FOR GRANTING THE PETITION

This case raises a number of issues of exceptional importance that warrant review by the Court. In particular, the case raises fundamental questions about the nature of the scientific process and the quantum of evidence necessary for parties to litigation to demonstrate causation (or lack thereof) on scientific matters.

In its decision in this case, the Ninth Circuit badly fumbled in its efforts to deal with issues of causation in the scientific context and how they relate to burdens of proof. The Ninth Circuit decision is directly at odds with this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), with respect to judicial evaluation of scientific methodology, and the Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), with respect to a plaintiff's evidentiary burdens in resisting a Fed. R. Civ. P. 56 motion for summary judg-

ment. It also conflicts with the decisions of several other courts of appeals on these issues, as well as on an important First Amendment question: whether the First Amendment prohibits imposition of liability on a media defendant based on its dissemination of statements which, though literally true, imply falsehoods.

At the center of this case is an issue of exceptional public importance: the adequacy and safety of our nation's food supply and the proper role of pesticides therein. The lower federal courts are being deluged with suits raising this issue. The Court's review of this case would provide badly needed guidance regarding how the lower courts should address the highly technical, scientific questions raised by such suits.

Moreover, the specific issues raised by this case -- whether CBS falsely maligned apples treated with Alar and falsely stated that Alar was "the most potent cancer-causing agent in our food supply" -- have become rallying cries for both sides of the scientific debate over use of chemicals in agriculture. Indeed, numerous states have adopted new and broader product disparagement laws in response to the widely-held belief among farmers that CBS treated apple growers unfairly and lied about their products. The widespread public interest in this case and the important issues of questions of federal law it raises warrant review of the case by the Court.

I. THE COURT SHOULD PROVIDE GUIDANCE ON THE QUANTUM OF EVIDENCE A PLAINTIFF MUST PRESENT ON SCIENTIFIC CAUSATION QUESTIONS IN ORDER TO WITHSTAND A SUMMARY JUDGMENT MOTION

As the number of federal cases raising complex scientific causation questions continues to increase, it is important for the Court to provide guidance to the lower federal courts on how such questions are to be addressed. The

Ninth Circuit's decision is a textbook case of how *not* to address such questions and cries out for further review.

As a factual matter, the Ninth Circuit was either unfamiliar with or did not understand the record of this case. As summarized on Pages 6-8 above, Petitioners introduced a massive quantity of evidence in the district court to demonstrate the falsity of the "60 Minutes" broadcast, evidence not cited by the Ninth Circuit. For example, although conceding that all epidemiological studies have shown an absence of any link between Alar/UDMH and cancer in humans (App. 10a), the Ninth Circuit appeared to be unaware of Petitioners' evidence that many studies have concluded that Alar/UDMH have not been established even as *rodent* carcinogens.[10] That evidence alone should have been sufficient to withstand CBS's motion for summary judgment on the issue of falsity.

More importantly, the legal standards applied by the Ninth Circuit in affirming the grant of summary judgment under Fed. R. Civ. P. 56 directly conflict with standards previously established by this Court. Rule 56(c) provides that summary judgment should be entered for the moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Court has held that "summary judgment will not lie if a dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court explained, "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence

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[10] *See, e.g., supra* at 7 (conclusions of United Nation's joint FAO/WHO Expert Committee and expert panel of Great Britain's Ministry of Agriculture, Fisheries and Food).

and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249.

Contrary to *Anderson*, the Ninth Circuit assigned to itself the role of arbiter of scientific questions. The court ruled that Petitioners would not be permitted to argue to a jury that animal studies are not a reliable method of determining a chemical's propensity to cause cancer in humans because, the Ninth Circuit decreed, "Animal studies are a legitimate means for assessing cancer risks to humans" and thus "can be relied upon." App. 11a-12a.[11] Nor was the Ninth Circuit willing to consider Petitioners' numerous objections to the methodology employed in those animal studies that determined Alar/UDMH to be rodent carcinogens.

But if this were merely another case in which a federal court exceeded the bounds of Rule 56 by weighing the evidence before it, the case might not merit review by this Court. What makes the Ninth Circuit's decision particu-

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[11] The cases cited by the Ninth Circuit do not support its sweeping ruling. *See Environmental Defense Fund v. EPA*, 548 F.2d 998, 1006 (D.C. Cir. 1976), *cert. denied sub nom., Velsicol Chem. Corp. v. EPA*, 431 U.S. 925 (1977); *Villari v. Terminix Int'l, Inc.*, 692 F. Supp. 568, 570 (E.D. Pa. 1988). In *Environmental Defense Fund*, the D.C. Circuit held, in response to a petition challenging an EPA decision to suspend registrations for several pesticides, that animal studies provided the EPA Administrator (the trier of fact) with "substantial evidence" upon which to determine that the pesticides were human carcinogens. In *Villari*, the district court denied a Fed. R. Evid. 703 motion to exclude animal studies from trial (on the question of whether the defendant's termiticides were probable human carcinogens and thus had "contaminated" the plaintiffs' house); the district court said that animal studies were the type of evidence that could "reasonably" be relied on and thus were admissible. Neither court so much as suggested that the animal studies conclusively determined that the chemicals in question were human carcinogens and foreclosed a contrary determination by the finder of fact.

larly disturbing (and therefore worthy of review) is the premise that underlies the decision: scientific claims over which competent scientists disagree can never (or rarely) be verified as right or wrong. Thus, the Ninth Circuit held, so long as CBS could demonstrate that some animal studies have determined UDMH to be a rodent carcinogen and that EPA (acting on the basis of those studies) had decided that the potential human cancer risk warranted revocation of Alar's registration, no amount of evidence from Petitioners would be sufficient to demonstrate by a preponderance of the evidence that the "60 Minutes" broadcast -- including the statement that Alar is the "most potent cancer-causing agent in our food supply" -- was false. App. 10a-13a.[12]

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[12] The District Court more openly embraced this theory of scientific relativism than did the Ninth Circuit. The District Court said that, given the uncertainties inherent in predicting human cancer risk from animal studies, CBS's "most potent" statement "could be true"; and "[s]ince the CBS statement could be true, it cannot be proven false." App. 23a. The District Court further held that Petitioners' evidence that Alar is no more harmful to children than to adults (*see, e.g.*, Wilkinson Aff. at 14) and that Alar does not cause childhood cancer was not sufficient evidence to withstand summary judgment on the issue of falsity, because such evidence merely showed that there is a dispute among scientists "over whether [Alar] is more harmful to children." *Id.* The Ninth Circuit was less open in its embrace of scientific relativism but clearly mimicked the District Court's logic. For example, despite recognizing that "there have been no studies conducted specifically on the cancer risks to children from [Alar]" (App. 13a), the Ninth Circuit nonetheless held that Petitioners had failed to create a genuine issue as to the falsity of CBS's claim that "EPA knows [that Alar] is going to cause cancer for thousands of children over their lifetime" -- apparently because of the absence of definitive studies on the issue. *Id.* In other words, the "60 Minutes" broadcast could not be proven false based on such evidence as the opinion of Petitioners' experts that there was no scientific basis for the CBS assertions, or EPA's denial that it "knew" that thousands of children would die of Alar-induced cancer.

The Court rejected such an anti-scientific approach in *Daubert*. *Daubert* held that it is incumbent upon federal judges, when ruling upon the admissibility of expert scientific testimony, to undertake a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid" and to exclude proffered testimony that does not meet that standard. *Daubert*, 113 S. Ct. at 2796. The Court said that the essence of any scientifically valid methodology is that its conclusions can be tested and determined to be true or false: "The criteria of the scientific status of a theory is its falsifiability, or refutability, or testability." *Id.* at 2797 (quoting K. Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* 37 (5th ed. 1989). Since by definition any scientific claim (such as a claim that Alar is a human carcinogen or that it is "[t]he most potent cancer-causing agent in our food supply") is capable of being proven true or false, Petitioners' substantial evidence that the CBS broadcast included false statements is sufficient to warrant a trial on the merits -- regardless that CBS may have introduced contrary evidence.

Indeed, with respect to falsity, Petitioners are unaware of a single scientist -- with the possible exception of those affiliated with CBS or the NRDC -- who believes that Alar or UDMH is "the most potent cancer-causing agent in our food supply." *See, e.g.*, L. Gold, B. Ames, *et al.*, "Rodent Carcinogens: Setting Priorities," 258 *Science* 261-65 (1992); J. Trefil, "How the body defends itself from the risky business of living," 26 *Smithsonian* 42 (Dec. 1995). A report issued just last week by a 20-member panel of the National Academy of Sciences' National Research Council concluded: (1) the cancer risk from natural and synthetic chemicals in our food supply is minimal, but to the extent that there is any risk, it comes predominantly from *natural* chemicals, which are considered far more carcinogenic than any synthetic chemical found in food; (2) about 1/3 of the 1.35 million new cancer cases each year can be traced to diet, but virtually all of those diet-related cancers are

attributable to poor eating habits (such as overconsumption of calories and fat); and (3) because fruits and vegetables contain anticarcinogens, a diet rich in fruits and vegetables (even fruits and vegetables that have been treated with pesticides) is a good way to reduce cancer risk. NRC, *Carcinogens and Anticarcinogens in the Human Diet* (Feb. 1996). The panel also urged caution in drawing any conclusions from animal studies regarding cancer risks.

The lower courts' rulings that Petitioners failed to raise a genuine issue of material fact on falsity appear to have been based in large measure on the fact that Petitioners bear the burden of proving falsity in this product disparagement action. *See, e.g.*, App. 13a, 23a. But the burden of "proving" falsity in the legal sense should not be confused with scientific usage of the term "proof," a confusion to which the lower courts appear to have fallen prey. A scientific "proof" generally entails near certainty of result. Civil litigants, on the other hand, generally can meet their burden of proof under a preponderance-of-the-evidence standard. Thus, on the one hand, Petitioners' experts readily conceded in their depositions that they could not absolutely prove (in a scientific sense) that Alar is *not* a human carcinogen; proving a negative to an absolute certainty is a near impossibility. Yet, in order to establish falsity in a legal sense, all Petitioners must do is demonstrate that it is more likely than not that the "60 Minutes" broadcast was false;[13] and under *Anderson*, all Petitioners need do in order to withstand a motion for summary judgment on the issue of falsity is to introduce evidence "such that a reasonable jury could return a verdict for them" under a preponderance-of-the-evidence standard. *Anderson*, 477

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[13] CBS argued below that Petitioners ought to be required to prove falsity under a clear-and-convincing-evidence standard. However, the Ninth Circuit never reached that issue, finding that Petitioners had failed to meet their evidentiary burden on the issue of falsity even if a preponderance-of-the-evidence standard were applicable. App. 8a.

U.S. at 248. The lower courts strayed from *Anderson* by confusing scientific and legal standards of proof and finding that Petitioners had failed to meet their evidentiary burden simply because it was *possible* that the "60 Minutes" broadcast was true.[14]

The Court should grant certiorari in order to make clear that the Rule 56 standards established in *Anderson* are not altered simply because the issues in dispute involve complex scientific questions. Indeed, the increasing frequency with which the federal courts are being called upon to decide such questions renders this case particularly appropriate for further review. Courts are repeatedly being asked to determine whether particular chemicals are the cause of various injuries, and are responding with a variety of approaches. *See, e.g., Redland Soccer Club, Inc. v. Dep't of the Army*, 55 F.3d 827 (3d Cir. 1995)(reversing

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[14] *See, e.g.*, App. 23a ("Since the CBS statement [that Alar is the most potent cancer-causing agent in our food supply] could be true, it cannot be proven false."). The District Court held that because the evidence regarding falsity was "ambiguous," this Court's decision in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), required entry of summary judgment for CBS. App. 22a. The court's reliance on *Hepps* was misplaced. *Hepps* held that in a defamation action brought against a media defendant regarding issues of public concern, the plaintiff bears the burden of proving that the disputed statement is false. *Hepps*, 475 U.S. at 777. *Hepps* addresses how *the trier of fact* should rule in the event it is unable to determine the truth or falsity of the disputed speech; nothing in the decision purports to give guidance to a trial judge ruling on a summary judgment motion. Moreover, it is clear from the district judge's language that he misinterpreted *Hepps*: he viewed it as requiring summary judgment whenever the disputed speech "could be true" or "could conceivably be true." App. 23a. Nothing in *Hepps* dictates that result, and the District Court appears to have applied the precise opposite rule from that mandated by Rule 56: it should have denied summary judgment so long as a reasonable trier of fact "could" have found that the "60 Minutes" broadcast was false.

grant of summary judgment against plaintiffs alleging injury caused by defendant's chemical wastes), *cert. denied,* 64 U.S.L.W. 3484 (Jan. 16, 1996); *In re Joint Eastern & Southern District Asbestos Litigation*, 52 F.3d 1124 (2d Cir. 1995)(reversing grant of judgment for defendant where district court had weighed scientific evidence on causation; *Daubert* did not alter standards for granting judgments as a matter of law); *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994) (district court improperly engaged in weighing scientific evidence in granting summary judgment to defendant), *cert. denied sub nom., General Electric Co. v. Ingram*, 115 S. Ct. 1253 (1995); *Tobin v. Astra Pharmaceutical Products,* 993 F.2d 528 (6th Cir.), *cert. denied sub nom., Duphar, B.V. v. Tobin*, 114 S. Ct. 304 (1993).[15]

The frequency with which the federal courts are called upon to address such complex scientific issues is likely to increase as more and more states adopt product disparagement laws. This past month, Ohio became the twelfth state in the past five years to adopt a law designed to protect agricultural products from false disparagement. *See* "Mind How You Disparage Asparagus or Berate Broccoli," *Los Angeles Times*, Part E (Jan. 18, 1996). Commentators

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[15] Under the approach adopted by the courts below, summary judgment should be entered for the defendant in *every* product liability action in which the plaintiff has the burden of demonstrating that his injury was caused by the defendant's product and both sides have submitted admissible scientific evidence on the question of causation. That is the logical result of a nonscientific approach that assumes that the proposition, "A caused B," can never be proven true or false (and thus is not a proper subject for jury deliberation) so long as reasonable scientists disagree over the proposition. The Court rejected that approach in *Daubert*; it never suggested, for example, that Merrell Dow's introduction of admissible scientific evidence that Bendectin did not cause birth defects entitled it to entry of summary judgment on the issue of causation. *See, e.g., Daubert,* 113 S. Ct. at 2798-99.

have generally viewed these laws as a direct response to the "60 Minutes" broadcast, born of the widely-held belief among farmers that CBS treated apple growers unfairly and lied about their products. *Id.* Indeed, this suit has become a central focus of the scientific debate over use of chemicals in agriculture. In light of the importance placed upon the suit by broad segments of the general public, it would be particularly appropriate for the Court to grant review in order to ensure that the scientific issues are being addressed appropriately.

II. THE COURT SHOULD GRANT REVIEW IN ORDER TO DETERMINE THE EXTENT OF THE BURDEN OF PRODUCTION PLACED ON A PARTY SEEKING SUMMARY JUDGMENT

The Court should also grant review in this case in order to resolve an issue that has divided the appeals courts: what is the initial burden of production imposed by Rule 56 on a party moving for summary judgment.

The Court briefly touched on that issue in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). The Court held that a party seeking summary judgment is not required to append to its motion "affidavits or other similar materials" for the purpose of negating the opponent's claim. *Celotex,* 477 U.S. at 323. Nonetheless, the Court noted that the moving party does bear a burden of coming forward with evidence:

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Id. (quoting Fed. R. Civ. P. 56). The Court did not further elaborate on the precise nature of the burden of production imposed by Rule 56 on the moving party, including what steps the moving party must take to "identify[]" favorable portions of the record.

In this case, the Ninth Circuit held that CBS had met its initial burden of production and went on to grant summary judgment to CBS on the issue of falsity, holding that Petitioners had failed to provide sufficient evidence that *any* statement contained in the "60 Minutes" broadcast was false. What was particularly surprising about the Ninth Circuit's ruling was that not even CBS had claimed that every statement in its broadcast was true. *See, e.g.*, CBS's Ninth Circuit Brief at 33 (backing away from broadcast claim that Alar is the "most potent cancer-causing agents in our food supply," but asserting, "Even if UDMH was not the most potent carcinogen in existence, it made Alar one of the most potent carcinogens *added* to the food supply" (emphasis added), and thus the statement did not appreciably affect the overall message, or "sting" of the broadcast). Thus, the Ninth Circuit found that CBS had met its initial burden of production under Rule 56, even though CBS had never called either the court's or Petitioners' attention to evidence suggesting (as the Ninth Circuit eventually found) that every statement in the "60 Minutes" broadcast was literally true.[16]

The Ninth Circuit's grant of summary judgment to CBS on a ground never raised by CBS is extremely problematical. A principal reason for imposing a burden of pro-

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[16] Indeed, the Ninth Circuit acknowledged in its opinion that CBS in its brief "d[id] not dispute the growers' reliance on an overall message" and did not insist on the literal truthfulness of every statement in the broadcast. App. 14a n.9. Rather, the Ninth Circuit conceded, "CBS merely argues that we need not adopt the growers' view of the message of the broadcast." *Id.*

duction on a party seeking summary judgment is to place the nonmoving party on notice of the types of evidence he will need to present in order to resist entry of summary judgment. *Celotex*, 477 U.S. at 326. Because CBS's motion focused so heavily on the overall message of the "60 Minutes" broadcast (and Petitioners' alleged inability to demonstrate the falsity of that overall message), Petitioners' opposition papers also focused on the broadcast's overall message. While Petitioners introduced some evidence that the "most potent" statement was false, they did not dwell on the point in light of CBS's concession that the statement was not literally true. Instead, Petitioners devoted a major portion of their argument to attempting to demonstrate just what the overall message of the broadcast was. They introduced lengthy affidavits from psychology and communications experts (Drs. Paul Slovic and David Frank), who analyzed the entire broadcast (including visual images) and offered expert opinions regarding the overall message. It simply was not fair to Petitioners for the Ninth Circuit to affirm the grant of summary judgment based on an argument that CBS had not raised (and that had not been the basis of the District Court's decision), because Petitioners had not been on notice that they needed to focus on the argument in order to resist summary judgment. Had they received such notice, they could have filled the record with overwhelming evidence that virtually no reputable scientists agree with CBS's assessment that Alar is "the most potent cancer-causing agent in our food supply."[17]

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[17] CBS's alternative argument -- that the "most potent" statement did not alter the defamatory sting of the broadcast -- is without merit. The sudden unwillingness of consumers to buy apples in March 1989 makes sense only if they understood the broadcast to mean that apples were the most dangerous product in supermarkets. Had they merely believed that Alar was a potential human carcinogen -- but was no more dangerous than chemicals found naturally in many other foods -- there would have been no reason to single out apples as a product to avoid.

Other post-*Celotex* court of appeals decisions have imposed a far stricter burden of production on a party seeking summary judgment under Rule 56. For example, the D.C. Circuit in *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 800 F.2d 1208 (D.C. Cir. 1986), reversed the grant of summary judgment to a libel defendant because the plaintiff had not properly been put on notice that he needed to present evidence on the issue of actual malice. The defendant, *Science* magazine, had moved for summary judgment on the issue of falsity; the district court did not rule on that issue but, rather, held *sua sponte* as a matter of law that the defendant had not published with actual malice. The D.C. Circuit reversed, explaining:

> While district courts possess the authority to enter summary judgment against a party *sua sponte, see Celotex Corp. v. Catrett,* 477 U.S. 317, 326 (1986), that authority may only be exercised "so long as the losing party was on notice that she had to come forward with all of her evidence." *Id.* In this case, McBride was not on notice that he was obliged to marshall evidence establishing a triable issue over the defendants' actual malice or face summary judgment. Having been afforded no opportunity for discovery into the *Science* defendants' state of mind, McBride could hardly have anticipated that the time had come to put up or shut up on the question of their actual malice.

McBride, 800 F.2d at 1212.

The Eleventh Circuit ruled similarly in *Hammer v. Slater*, 20 F.3d 1137 (11th Cir. 1994). In that case, the Eleventh Circuit reversed a grant of summary judgment to libel defendants on the issue of actual malice, finding that there was a "triable issue of fact as to the [defendants'] actual malice." *Hammer,* 20 F.3d at 1143. Before reaching that issue, however, the court made clear that the defendants (the parties seeking summary judgment) bore the initial burden of "show[ing] that the non-moving party

has no evidence to support its case, or present[ing] 'affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial.'" *Id.* at 1141 (quoting *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 (11th Cir. 1991)(*en banc*).

The Court should grant the Petition in order to resolve this conflict regarding the extent of the burden of production imposed on a party seeking summary judgment under Fed. R. Civ. P. 56.

III. THE COURT SHOULD GRANT REVIEW IN ORDER TO DETERMINE THE EXTENT TO WHICH THE FIRST AMENDMENT PROTECTS LITERALLY TRUE STATEMENTS WITH DEFAMATORY IMPLICATIONS

The Court should also grant review in this case to resolve an important First Amendment issue that has divided the federal appeals courts: whether the First Amendment protects speakers from liability for statements which, although literally true, have false and defamatory implications.

The Ninth Circuit held in this case that, in the absence of evidence that individual statements in the "60 Minutes" broadcast were false, Petitioners could not withstand summary judgment on the issue of falsity by presenting evidence that the broadcast implied an overall message that was false. App. 13a-15a. The court said that the focus of a product disparagement action must be on the truth or falsity of individual statements contained in a challenged news account, not on the overall implied message of the news account; the cause of action must fail if no individual statement is shown to be false, without regard to any overall implied message alleged by the plaintiff. *Id.* The court held that a contrary rule would "raise[] the spectre of a chilling effect" (App. 15a) on First Amendment speech

rights because it would create uncertainty regarding when journalists could be held liable for their words:

> Because a broadcast could be interpreted in numerous, nuanced ways, a great deal of uncertainty would arise as to the message conveyed by the broadcast. Such uncertainty would make it difficult for broadcasters to predict whether their work would subject them to tort liability.

Id.[18]

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[18] In addition to its concerns that a contrary rule would chill First Amendment rights, the Ninth Circuit also stated that its result appeared to be dictated by Washington state law. App. 14a-15a. However, the Ninth Circuit cited no Washington Supreme Court decisions but rather relied on a single libel-law decision from the Washington Court of Appeals: *Lee v. Columbian, Inc.*, 64 Wash. App. 534, 826 P.2d 217 (1991). App. 14a. The Ninth Circuit did not have the benefit of briefing from the parties on the issue, since CBS had not raised the issue. In fact, Washington Supreme Court case law makes clear that Washington *does* permit libel plaintiffs to recover for false implications emanating from literally-true statements. *See Taskett v. King Broadcasting Co.*, 86 Wash. 2d 439, 445, 546 P.2d 81, 85 (1976)("we hold that a private individual . . . may recover actual damages for a defamatory falsehood, concerning a subject of general or public interest, . . . on a showing that in publishing a statement, the defendant knew or, in the exercise of reasonable care, should have known that *the statement . . . would create a false impression in some material respect*") (emphasis added); *Pitts v. Spokane Chronicle Co.*, 63 Wash. 2d 763, 770, 388 P.2d 976, 980-81 (1964); *Purvis v. Bremer's, Inc.*, 54 Wash. 2d 743, 751, 344 P.2d 705, 711 (1959). The Ninth Circuit apparently realized that its citation to a single Washington lower-court libel decision provided inadequate support for its position that a product disparagement plaintiff may not recover for false implications contained in literally-true statements, because it felt obliged to rest its decision on the First Amendment as well. Accordingly, it cannot fairly be said that the court's "implied falsehood" ruling was grounded in state law.

The Ninth Circuit's holding is in direct conflict with First Amendment decisions from the D.C. and Fourth Circuits. In *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990), the D.C. Circuit (applying First Amendment standards) reversed a district court order granting summary judgment to a libel defendant on the issue of falsity, even though everything contained in the letters written by the defendant were literally true, because the letters could reasonably be read as implying that the plaintiff police officer had used illegal drugs. *White,* 909 F.2d at 521. The court explained:

> [I]f a communication, viewed in its entire context, merely conveys materially true facts from which a defamatory inference can reasonably be drawn, the libel is not established. But if the communication, by the particular manner or language in which the true facts are conveyed, supplies additional, affirmative evidence suggesting that the defendant *intends or endorses* the defamatory inference, the communication will be deemed capable of bearing that meaning.

Id.

Similarly, in *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993), the Fourth Circuit upheld an order granting summary judgment to a newspaper alleged to have libeled a charity by implication. In the course of doing so, the court explicitly adopted *White*'s First Amendment standards for judging whether material is false by implication:

> Moreover, because the constitution provides a sanctuary for truth, a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true. The language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends to endorse the inference. *White v.*

Fraternal Order of Police, 909 F.2d 512, 520 (D.C. Cir. 1990).

Chapin, 993 F.2d at 1092-93.

The Ninth Circuit's decision also appears to be inconsistent with the standard applied by the Eighth Circuit. In *Janklow v. Newsweek, Inc.*, 759 F.2d 644 (8th Cir. 1985), *reheard on other grounds*, 788 F.2d 1300 (8th Cir.)(*en banc)*, *cert. denied*, 479 U.S. 883 (1986), the Eighth Circuit affirmed a summary judgment award in a libel case to a news media defendant which had accurately reported a 14-year-old girl's rape allegation against the plaintiff but had omitted the facts that: (1) the plaintiff had passed a lie detector test and the girl had not; (2) a medical examination showed no signs of rape; and (3) numerous federal authorities had called the rape allegations unfounded. The court stated, however, that the First Amendment would not preclude a libel award based on omissions from a literally true article if the omissions would convey false implications -- such as that the plaintiff had, in fact, committed the rape. *Janklow,* 759 F.2d at 648-49.

The Ninth Circuit's decision also appears to be inconsistent with decisions of this Court. The Court held in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), that the First Amendment did not provide blanket protection for all statements of opinion -- because "expressions of 'opinion' may often imply an assertion of objective fact." *Milkovich* at 18. The Court said that the "dispositive" First Amendment question in libel cases involving statements of opinion is "whether or not a reasonable factfinder could conclude that the [challenged] statements . . . imply [a false] assertion." *Id.* at 21. *Milkovich*'s willingness to permit libel damages to be assessed on the basis of implications from statements of opinions suggests that the First Amendment does not bar damage awards on the basis of implications from literally-true statements of fact.

Petitioners do not concede that the statements contained in the "60 Minutes" broadcast were literally true. Nonetheless, even assuming that the Ninth Circuit was correct in determining that the broadcast was literally true, Petitioners ought to be permitted an opportunity to demonstrate that the broadcast implied false statements of fact about their products. The Ninth Circuit has ruled, in conflict with rulings from at least two other circuits, that the First Amendment prohibits imposition of damages on the basis of a literally true statement, regardless of what false implications emanate from that statement. The Court should grant the Petition to resolve that conflict.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal
Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Counsel for Petitioners

Dated: February 26, 1996

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRADY AUVIL and LILLIE AUVIL, husband and wife; ROBERT BERNATH and CATHY BERNATH, husband and wife; ROBERT BRODY and CHARLOTTE BRODY, husband and wife; BURT CHESTNUT and ELLY CHESTNUT, husband and wife; HAROLD COX and LORRAINE COX, husband and wife; FERRELL DEEN and PEGGY DEEN, husband and wife; CHARLES DRAKE and MAXINE DRAKE, d/b/a FROSTY RED ORCHARD, INC., husband and wife; JAMES EDDIE, d/b/a EDDIE FARMS, INC.; PAUL HUDSON, a married man on behalf of his separate property; BERT STENNES and EVELYN STENNES, husband and wife, d/b/a SQUAW CREEK RANCH, INC.; NORMAN WILSON and WANDA WILSON, husband and wife, *Plaintiffs-Appellants*,	)	No. 93-35963 D.C. No. CV-90-00533-WFN
v.	)	OPINION
CBS "60 MINUTES", a foreign corporation; COLUMBIA BROADCASTING SYSTEM (CBS), a foreign corporation; RETLAW ENTERPRISES, INC., a corporation, d/b/a KIMA Television; BONNEVILLE INTERNATIONAL	)	

CORPORATION, a corporation, d/b/a KIRO Television; KING BROADCASTING COMPANY, a corporation, d/b/a KREM Television,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Washington
Wm. Fremming Nielson, District Judge, Presiding

Argued and Submitted
October 7, 1994 -- Seattle, Washington
Filed October 2, 1995.

Before: Harlington Wood, Jr.,* Procter Hug, Jr., and Harry Pregerson,** Circuit Judges.

COUNSEL

Scott A. Jonsson, Peter A. Ozanne, Mildred J. Carmack, Steve C. Morasch, Schwabe, Williamson & Wyatt, Portland, Oregon, for the plaintiffs-appellants.

* Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

** Judge Tang was originally a member of this panel and heard argument in this case. Judge Tang died prior to circulation of this opinion, and pursuant to General Order 3.2(g), Judge Pregerson was drawn as a replacement. Judge Pregerson was furnished with a tape of the oral argument as well as the briefs and other materials received by the other members of the panel.

P. Cameron DeVore, Bruce E.H. Johnson, Christopher Pesce, William C. Komaroff, Davis Wright Tremaine, Seattle, Washington, and Douglas P. Jacobs, Susanna M. Lowy, Anthony M. Bongiorno, CBS Inc., New York, New York, for the defendants-appellees.

Richard A. Samp, Washington Legal Foundation, Washington, D.C., for amicus Washington Legal Foundation.

Lee Levine, Ross, Dixon & Masback, Washington, D.C., for amicus Capital Cities, et al.

Michael B. Trister, Lichtman, Trister, Singer & Ross, Washington, D.C., for amicus J. Routt Reigart, M.D.

Frederick A.O. Schwarz, Cravath, Swaine & Moore, New York City, for amicus Nat'l Wildlife Federation, et al.

OPINION

PER CURIAM:

Grady and Lillie Auvil et al., suing on behalf of themselves and other similarly situated Washington State apple growers ("growers"), appeal from the district court's summary judgment in favor of CBS "60 Minutes" ("CBS"). The district court held that the growers failed to prove the falsity of the message conveyed by the "60 Minutes" broadcast of "'A' is for Apple," which concerned the use of Alar, a chemical sprayed on apples.[1] We have jurisdiction under 28 U.S.C. § 1291, and we affirm because we agree

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[1] A transcript of the broadcast at issue in this case is reprinted in an appendix to the lower court opinion. *See Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928, 937 (E.D. Wash. 1992).

that the growers have failed to raise a genuine issue of material fact as to the falsity of the broadcast.

BACKGROUND

On February 26, 1989, CBS's weekly news show "60 Minutes" aired a segment on daminozide, a chemical growth regulator sprayed on apples. The broadcast, entitled "'A' is for Apple," also addressed the slow pace of government efforts to recall the chemical. The broadcast was based largely on a Natural Resources Defense Council ("NRDC") report, entitled *Intolerable Risk: Pesticides in Our Children's Food ("Intolerable Risk")*, which outlined health risks associated with the use of a number of pesticides on fruit, especially the risks to children. "'A' is for Apple" focused on the NRDC report's findings concerning daminozide, as well as the EPA's knowledge of daminozide's carcinogenity. Scientific research had indicated that daminozide, more commonly known by its trade name, Alar, breaks down into unsymmetrical dimethylhydrazine (UDMH), a carcinogen.[2]

The segment opened with the following capsule summary from Ed Bradley, a "60 Minutes" commentator:

> The most potent cancer-causing agent in our food supply is a substance sprayed on apples to keep them on the trees longer and make them look better. That's the conclusion of a number of scientific experts. And

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[2] Alar cannot be removed either by washing the fruit or peeling it. In addition, the substance remains in the flesh of the apple and, as a result, can be found in processed apple products, including apple juice and applesauce.

> who is most at risk? Children, who may someday develop cancer from this one chemical called daminozide. Daminozide, which has been sprayed on apples for more than 20 years, breaks down into another chemical called UDMH.

During the broadcast, Bradley garnered a number of viewpoints on the Alar issue. Those interviewed included an Environmental Protection Agency ("EPA") administrator, an NRDC attorney, a U.S. congressman, a professor of pediatrics at Harvard Medical School, and a scientist from the Consumers Union, which publishes *Consumer Reports* magazine. After Bradley's opening synopsis, the broadcast segment began with the EPA administrator's admission that the EPA had known of cancer risks associated with daminozide for sixteen years, but that EPA regulations had hampered the removal of the chemical from the market. The U.S. Congressman rejected the EPA administrator's explanation that the laws were to blame for the EPA's hesitation. He thought that it was well within the EPA's power to remove daminozide from the market, and that the EPA's reluctance stemmed from its fear that Uniroyal, the company that manufactured daminozide, would sue the EPA. The broadcast segment continued with testimonials from the NRDC attorney, who discussed the findings published in *Intolerable Risk*, focusing on the cancer risks to children from ingestion of apples treated with daminozide. The NRDC's findings were corroborated both by the EPA administrator and the Harvard pediatrician. The broadcast ended with the statements of a Consumers Union scientist, who revealed that most manufacturers of apple products said they no longer use apples treated with daminozide but that the manufacturers were unsuccessful in keeping daminozide completely out of their products.

Following the "60 Minutes" broadcast, consumer demand for apples and apple products decreased dramatically. The apple growers and others dependent upon apple production lost millions of dollars. Many of the growers lost their homes and livelihoods.

In November 1990, eleven Washington State apple growers, representing some 4,700 growers in the Washington area, filed a complaint in Washington State Superior Court against CBS, local CBS affiliates, the NRDC, and Fenton Communications, Inc., a public relations firm used by the NRDC in 1989. The growers asserted, among others, a claim for product disparagement.

In December 1990, CBS removed the cause to the United States District Court for the Eastern District of Washington on diversity grounds. The growers moved to remand to state court. The district court denied the growers' motion to remand and dismissed their claims against CBS's local affiliates. *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928 (E.D. Wash.1992) ("*Auvil I*").[3] In addition, the court denied CBS's motion to dismiss or for summary judgment on the issue of whether the television broadcast was "of and concerning" the apple growers or their products. *Id.* The district court dismissed CBS's argument on the ground that, because all apples were

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[3] In a separate order, the district court dismissed the growers' claims against the NRDC and Fenton Communications. *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 941 (E.D. Wash. 1992)("*Auvil II*").

identified as dangerous, the growers could bring suit for the disparagement of their product. *Id.* at 932-935.[4]

After discovery, which was limited to the question of the falsity of the CBS broadcast, the growers moved to strike the opinions of CBS's expert witnesses and also for partial summary judgment on the question of falsity. CBS also moved for summary judgment on the question of falsity. The district court denied the growers' motions but granted summary judgment to CBS because the growers did not produce evidence sufficient to create a triable issue of fact as to the falsity of the broadcast. *Auvil v. CBS "60 Minutes"*, 836 F. Supp. 740 (E.D. Wash. 1993) (*"Auvil III"*). The growers appeal the district court's summary judgment ruling that they failed to offer evidence sufficient to present a genuine issue of fact for trial on the falsity of the CBS broadcast.

DISCUSSION

We review the district court's summary judgment ruling de novo. *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1052 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991). To survive CBS's motion for summary judgment, the growers must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). There is no issue for trial unless "there is sufficient evidence favoring the nonmoving

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[4] Applicability of the "of and concerning" requirement to product disparagement law is raised on appeal. We need not decide this issue, however, because we agree that, regardless of whether the broadcast was "of and concerning" their product, the growers cannot show falsity.

party for a jury to return a verdict for that party." *Id.* at 2511 (citations omitted). Thus, while they need not definitively prove the falsity of statements made during the CBS broadcast, "[t]he mere existence of a scintilla of evidence in support of the [growers'] position will be insufficient; there must be evidence on which the jury could reasonably find for the [growers]." *Id.* at 252. Our inquiry, therefore, asks whether reasonable jurors could find that the growers are entitled to a verdict--"whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Id.* (citation omitted).[5]

Although there are no Washington state cases dealing directly with a product disparagement cause of action, a Washington state appellate court, citing the Restatement of Torts, recognized that those whose products are disparaged face a higher burden of proof than do defamation plaintiffs. *See Waechter v. Carnation Co.*, 5 Wash. App. 121, 485 P.2d 1000, 1003-04 (1971). We assume, therefore, that Washington recognizes product disparagement causes of action. We also look to the Restatement, as did the Washington court, for guidance regarding applicable standards.

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[5] The Washington courts have not answered directly the question of whether to use a preponderance of the evidence or convincing clarity standard of proof in proving falsity. *Compare Haueter v. Cowles Pub. Co.*, 61 Wash. App. 572, 811 P.2d 231 (1991) (preponderance of the evidence standard) *with Herron v. King Broadcasting Co.*, 112 Wash. 2d 762, 776 P.2d 98 (1989) (clear and convincing standard). We do not decide which standard should be used in this context because we find that the growers failed to meet the more generous preponderance of the evidence standard in proving the falsity of the CBS broadcast.

To establish a claim of product disparagement, also known as trade libel, a plaintiff must allege that the defendant published a knowingly false statement harmful to the interests of another and intended such publication to harm the plaintiff's pecuniary interests. Restatement (Second) of Torts § 623A. Accordingly, for a product disparagement claim to be actionable, the plaintiff must prove, *inter alia*, the falsity of the disparaging statements. *See* Restatement (Second) of Torts §§ 623A, 651(1)(c).

Existing case law on product disparagement provides little guidance on the falsity prong. Nonetheless, as a tort whose actionability depends on the existence of disparaging speech, the tort is substantively similar to defamation. Therefore, we reference defamation cases to arrive at a decision in the instant matter.

"'A' is for Apple" was based on *Intolerable Risk*, a scientific report disseminated by the NRDC. The report discussed the findings of cancer research studies on various chemicals used on fruit and questioned the EPA's hesitance in removing Alar from the market.[6] The broadcast contained a number of factual assertions, several of which

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[6] Neither party disputes that the broadcast disparaged apples. The broadcast communicated that daminozide is a potent human carcinogen that poses a significant risk to children. Because the broadcast focused on the use of daminozide on apples, the disparaging statements made during the broadcast about daminozide reflect negatively on apples.

are pointed out by the growers to support their claim that the broadcast falsely disparaged their product.[7]

On the subject of daminozide's cancer-causing potential, the growers point to the following statements:

> The most potent cancer-causing agent in our food supply is a substance sprayed on apples to keep them on the trees longer and make them look better.
>
> We know that [daminozide and other chemicals] do cause cancer.
>
> Just from these eight pesticides, what we're finding is that the risk of developing cancer is approximately 250 times what EPA says is an acceptable level of cancer in our population.
>
> [The EPA administrator] took another look at the evidence and decided to start the process of banning daminozide after all. But the process could take five years. So we returned to Washington to ask him why he doesn't just declare daminozide an imminent hazard, and suspend it right away....

The growers offered evidence showing that no studies have been conducted to test the relationship between ingestion of daminozide and incidence of cancer in *humans*. Such evidence, however, is insufficient to show a genuine issue for trial regarding the broadcast's assertions that dam-

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[7] The statements we recite herein were taken from the growers' briefs. *See* Appellants' Brief at 7, 8; Appellants' Reply Brief at 13.

inozide is a potent carcinogen. Animal laboratory tests are a legitimate means for assessing cancer risks to humans. *See Environmental Defense Fund v. EPA*, 548 F.2d 998, 1006 (D.C. Cir. 1976)(recognizing that EPA relies on animal test data to evaluate human cancer risks), *cert. denied sub nom., Velsicol Chem. Corp. v. EPA*, 431 U.S. 925 (1977); *Villari v. Terminix Int'l, Inc.*, 692 F. Supp. 568, 570 (E.D. Pa. 1988) (acknowledging that "animal studies are routinely relied upon by the scientific community in assessing the carcinogenic effects of chemicals on humans").

The growers provide no other challenge to the EPA's findings, nor do they directly attack the validity of the scientific studies. All of the statements referenced above are factual assertions made by the interviewees, based on the scientific findings of the NRDC. These findings were corroborated by the EPA administrator and a Harvard pediatrician. The EPA, which often relies on the results of animal studies, acknowledged that it knew of the cancer risks associated with ingestion of daminozide and, in August 1985, classified daminozide as a "probable human carcinogen." Indeed, the EPA estimated that the dietary risk to the general population from UDMH, a metabolite of daminozide, was fifty times an acceptable risk and ultimately concluded that daminozide posed an unreasonable risk to the general population. *See generally* 57 Fed. Reg.

46436, 46437-46440 (1992).[8]

The growers' only challenge to the scientific studies is their claim that animal studies cannot be relied on to indicate cancer risk for humans. Because animal studies can be relied upon, their evidence that no studies have been conducted on the effects of daminozide on humans does not create a genuine issue for trial on the falsity of the broadcast's assertions regarding daminozide's carcinogenicity.

On the subject of cancer risks to children from the use of daminozide on apples, the growers point to the following factual assertions to support their falsity claim:

> What we're talking about is a cancer-causing agent used on food that EPA knows is going to cause cancer for thousands of children over their lifetime.
>
> [T]he Natural Resources Defense Council[ ] has completed the most careful study yet on the effect of daminozide and seven other cancer-causing pesticides on the food children eat.

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[8] We find it worth noting that on February 1, 1989, the EPA announced that it had started proceedings to remove Alar from the market because of preliminary findings, based on laboratory tests on animals, that the chemical posed a risk of cancer to humans. A few months later, Uniroyal, the manufacturer of daminozide, voluntarily requested a withdrawal of daminozide's food use registrations. The EPA later canceled all food use registrations for daminozide in November 1989. *See* 54 Fed. Reg. 47492 (1992).

> [O]ver a lifetime, one child out of every 4,000 or so of our preschoolers will develop cancer just from these eight pesticides. [The NRDC study] says children are being exposed to a pesticide risk several hundred times greater than what the agency says is acceptable.

The growers offered evidence showing that no scientific study has been conducted on cancer risks to children from the use of pesticides. However, CBS based its statements regarding cancer and children on the NRDC's findings that the daminozide found on apples is more harmful to children because they ingest more apple products per unit of body weight than do adults. The growers have provided no affirmative evidence that daminozide does not pose a risk to children. The fact that there have been no studies conducted specifically on the cancer risks to children from daminozide does nothing to disprove the conclusion that, if children consume more of a carcinogenic substance than do adults, they are at higher risk for contracting cancer. The growers' evidence, therefore, does not create a genuine issue as to the falsity of the broadcast's assertion that daminozide is more harmful to children.

Despite their inability to prove that *statements* made during the broadcast were false, the growers assert that summary judgment for CBS was improper because a jury could find that the broadcast contained a provably false *message*, viewing the broadcast segment in its entirety. They further argue that, if they can prove the falsity of this implied message, they have satisfied their burden of proving falsity.

The growers' contentions are unavailing. Their attempt to derive a specific, implied message from the

broadcast as a whole and to prove the falsity of that overall *message* is unprecedented and inconsistent with Washington law. No Washington court has held that the analysis of falsity proceeds from an implied, disparaging message. It is the statements themselves that are of primary concern in the analysis.[9] For example, in *Lee v. Columbian, Inc.*, 64 Wash. App. 534, 826 P.2d 217 (1991), the plaintiff brought a defamation suit against a newspaper, claiming that the headline and lead sentence of a newspaper article defamed him.[10] He conceded that both statements were true on their face; nevertheless, he argued that the statements were false and capable of defamatory meaning. *Lee*, 826 P.2d at 219. He contended that "using irony and innuendo, the headline and lead sentence both strongly implied that Plaintiff was using a tax loophole to improperly reduce his taxes." *Id.* The Washington Court of Appeals found the plaintiff's argument to be meritless because

> [d]efamatory meaning may not be imputed to true statements. The defamatory character of the language must be apparent from the words themselves.

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[9] We note that CBS does not dispute the growers' reliance on an overall message. CBS merely argues that we need not adopt the growers' view of the message of the broadcast. However, CBS confuses the notion that a specific message can be considered in an overall context with the notion that we should analyze the falsity of an overall message.

[10] The headline of the article stated, "Cardroom parking fees reduce taxes." The article began with the following lead sentence: Darrell Lee, a high-profile attorney and enterprising poker promoter, has devised an unusual way to reduce his taxes and stay within the letter of the law on gambling activity at his two La Center cardrooms.

> Washington courts are "bound to invest words with their natural and obvious meaning and may not extend language by innuendo or by the conclusions of the pleader."

Id. (citing *Sims v. KIRO, Inc.*, 20 Wash. App. 229, 580 P.2d 642, 645 (1978), *cert. denied*, 441 U.S. 945 (1979)).

The Washington courts' view finds support in the Restatement, which instructs that a product disparagement plaintiff has the burden of proving the "falsity of the *statement*." Restatement (Second) of Torts § 651(1)(c) (emphasis added). This standard refers to individual statements and not to any overall message. Therefore, we must reject the growers' invitation to infer an overall message from the broadcast and determine whether that message is false.

We also note that, if we were to accept the growers' argument, plaintiffs bringing suit based on disparaging speech would escape summary judgment merely by arguing, as the growers have, that a jury should be allowed to determine both the overall message of a broadcast and whether that overall message is false. Because a broadcast could be interpreted in numerous, nuanced ways, a great deal of uncertainty would arise as to the message conveyed by the broadcast. Such uncertainty would make it difficult for broadcasters to predict whether their work would subject them to tort liability. Furthermore, such uncertainty raises the spectre of a chilling effect on

speech.[11]

CONCLUSION

Because the growers have failed to raise a genuine issue of material fact regarding the falsity of statements made during the broadcast of "'A' is for Apple," the district court's decision granting CBS's motion for summary judgment is

AFFIRMED.

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[11] There is an additional problem with the growers' arguments: their approach allows disparagement plaintiffs to construct an overall message that lends itself easily to proof of falsity. The instant case provides a cogent example. Rather than proving the falsity of statements made during "'A' is for Apple" by challenging the studies upon which factual assertions made during the broadcast were based, the growers request that we analyze the message that the studies *conclusively* show that apples cause cancer in humans. Accordingly, the growers offered evidence that the studies are *not conclusive*, that there are no studies tracing the specific link between ingestion of daminozide and incidence of cancer in humans. It is considerably easier to prove the falsity of an assertion that studies are conclusive, rather than to prove the falsity of the studies themselves.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRADY AUVIL and LILLIE AUVIL, husband and wife; ROBERT BERNATH and CATHY BERNATH, husband and wife; ROBERT BRODY and CHARLOTTE BRODY, husband and wife; BURT CHESTNUT and ELLY CHESTNUT, husband and wife; HAROLD COX and LORRAINE COX, husband and wife; FERRELL DEEN and PEGGY DEEN, husband and wife; CHARLES DRAKE and MAXINE DRAKE, d/b/a FROSTY RED ORCHARD, INC., husband and wife; JAMES EDDIE, d/b/a EDDIE FARMS, INC.; PAUL HUDSON, a married man on behalf of his separate property; BERT STENNES and EVELYN STENNES, husband and wife, d/b/a SQUAW CREEK RANCH, INC.; NORMAN WILSON and WANDA WILSON, husband and wife, *Plaintiffs-Appellants*,	)	No. 93-35963 D.C. No. CV-90-00533-WFN ORDER
v.	)	
CBS "60 MINUTES", a foreign corporation; COLUMBIA BROADCASTING SYSTEM (CBS), a foreign corporation; RETLAW ENTERPRISES, INC., a corporation, d/b/a KIMA Television; BONNEVILLE INTERNATIONAL	)	

CORPORATION, a corporation, d/b/a KIRO Television; KING BROADCASTING COMPANY, a corporation, d/b/a KREM Television, *Defendants-Appellees.*	)

(Filed October 27, 1995)

Before: WOOD*, HUG, and PREGERSON, Circuit Judges

Appellants' petition for rehearing is denied.

* Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

GRADY AUVIL and LILLIE AUVIL, husband and wife, et. al., Plaintiffs, v. CBS "60 MINUTES", a foreign corporation, etc., et al., Defendants.	)	No. CS-90-0553-WFN ORDER

Before the court are plaintiffs' Motions to Strike Experts' Opinions, Ct. Rec. 172, and for Partial Summary Judgment, Ct. Rec. 171, and defendants' Motion for Summary Judgment, Ct. Rec. 164, heard on August 26, 1993 before the undersigned. Appearing on behalf of plaintiffs were Scott Jonsson, Peter Ozanne and Jay Sandlin; appearing on behalf of defendants were Bruce Johnson and Cameron DeVore. Having heard the oral argument of counsel, having reviewed the record and being fully informed, this court **DENIES** plaintiffs' Motion to Strike Experts' Opinions; **DENIES** plaintiffs' Motion for Partial Summary Judgment; and **GRANTS** defendants' Motion for Summary Judgment.

The facts of this case have already been set out in *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928 (E.D. Wa. 1992).

A. Plaintiffs' Motion to Strike Experts' Opinions.

Plaintiffs have moved to strike the opinions of CBS' experts claiming they are all inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). In *Daubert*, the Supreme Court rejected the Ninth Circuit position that expert opinion is only admissible if it is based on a technique or methodology that is generally accepted by the scientific community. The thrust of Daubert was to move away from the focus on "'general acceptance,' as gauged by publication and the decisions of other courts" and to focus on whether "an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* at 2799. The expert testimony is clearly relevant to the task at hand so the only issue is reliability.

The plaintiffs maintain that the data underlying CBS' expert opinions is fundamentally flawed. However, this court finds that at least to the extent CBS' experts relied on the data and conclusions provided by the EPA, their conclusions are clearly sufficiently reliable for this inquiry.

B. Plaintiffs' Motion for Partial Summary Judgment Based on the Issue of Falsity.

In order to rule in plaintiffs' favor, this court would have to find there is no material issue of fact as to the falsity of CBS' broadcast. Fed.R.Civ.P. 56. This would be inappropriate in view of the fact that even the message of the broadcast is hotly contested. Since this court cannot find as a matter of law that the message of the broadcast is established, neither can it judge the falsity of that message.

C. Defendants' Motion for Summary Judgment.

CBS claims that it is entitled to summary judgment because the plaintiffs cannot prove that CBS' statements were false. As an initial matter, the burden and standard of proof must be established. In a disparagement case, plaintiff carries the initial burden of proof to show that an objectionable statement is false and made with actual malice. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Auvil*, 800 F. Supp. at 937. It is without dispute that malice must be established by clear and convincing evidence. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The Supreme Court and the Ninth Circuit have not ruled on whether falsity must also be established by clear and convincing evidence. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 661 n.2 (1989); *Newton v. National Broadcasting Company, Inc.*, 930 F.2d 662, 669 n. 7 (9th Cir. 1990), *cert. den.* 112 S. Ct. 192 (1991). However, the Washington State Supreme Court has held that "[a]ll the elements of defamation must be shown with convincing clarity." *Herron v. King Broadcasting*, 112 Wn. 2d 762, 768 (1989). But the *Herron* decision mistakenly cites *Liberty Lobby* for the proposition that falsity must be shown by convincing clarity. Further, *Herron* came down the same day that *Harte-Hanks* was issued and therefore the Washington court did not have the benefit of the *Harte-Hanks* comment that the issue was unsettled. Because of the unsettled nature of the standard, for the purposes of this summary judgment, the court will give the benefit to the non-moving party and apply the preponderance of the evidence standard of proof.

With this in mind, the court faces CBS' claims that its statements are not false and even if false, cannot be verified as false. CBS relies in a large part on *Philadelphia*

Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). The issue before the Supreme Court in *Hepps* was whether a private party plaintiff or a media defendant bore the burden of proof on the issue of falsity when a claim of defamation involves an issue of public importance. In shifting the burden of proof to the plaintiff, the Supreme Court stated:

> Because the burden of proof is the deciding factor only when the evidence is ambiguous, we cannot know how much of the speech affected by the allocation of the burden of proof is true and how much is false. In a case presenting a configuration of speech and plaintiff like the one we face here, and where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech.

Id. at 776. In *Hepps*, a private individual brought an action for defamation against Philadelphia Newspapers, Inc. which owns the Philadelphia Inquirer. The Inquirer had published a series of articles claiming that Mr. Hepps had links to organized crime and used these links to influence the state's government. It is this court's opinion that as in *Hepps*, this is such a case where the evidence is ambiguous even viewing it in a light most favorable to the plaintiffs as the non-moving party.

For the sake of this motion, this court adopts plaintiff's allegation as to the CBS broadcast message: Because of the use of daminozide, apples pose an imminent health hazard of causing cancer especially in children. This breaks down into three distinct factual issues raised by the broadcast: (1) daminozide is the most potent cancer-causing agent in our food supply; (2) daminozide poses an imminent hazard and an unacceptable risk; and (3)

daminozide is most harmful to children. None of these issues can be proven as false.

1. The most potent cancer-causing agent.

Plaintiffs argue that there are several naturally occurring chemicals that are more potent than daminozide. However, the plaintiffs do not dispute that the EPA has in fact listed daminozide as a probable human carcinogen and that its breakdown element of UDMH ranked as one of the most if not the most carcinogenic synthetic pesticide then on the market. Since the CBS statement could be true, it cannot be proven false.

2. Daminozide as an imminent hazard.

CBS accurately reported that daminozide has been linked to cancer. Because of the usually long latent period of cancer, ingesting a carcinogen at any time could create an imminent hazard of incurring cancer in the future. Again, this is an ambiguous statement that could conceivably be true and plaintiffs are incapable of proving false.

3. Children most at risk.

Plaintiffs have come forward with much evidence to the effect that there is no proof that daminozide is more harmful to children. CBS, on the other hand, has come forward with evidence that the daminozide found on apples is more harmful to children. Therefore at most plaintiffs have been able to show that there is dispute over whether daminozide is more harmful to children. Plaintiffs have not shown the CBS statement to be false.

The court is not unmindful of the wide ranging affect this broadcast had on Washington's apple industry. However, because this disparagement action raises constitutional issues of freedom of speech, this court is bound by the United States Supreme Court decisions. That Court recognized that:

> requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so. Nonetheless the Court's previous decisions on the restrictions that the First Amendment places upon the common law of defamation firmly support our conclusions here with respect to the allocation of the burden of proof. In attempting to resolve related issues in the defamation context, the Court has affirmed that '[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.'

Hepps, 475 U.S. at 778 citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). Here, the issue of the carcinogenic effect of pesticides in the food supply is speech that clearly matters.

Even if CBS' statements are false, they were about an issue that mattered, cannot be proven as false and therefore must be protected. To hold as plaintiffs request would have required CBS to take the EPA report and perform a highly technical scientific study before issuing a public broadcast about that report. A news reporting service is not a scientific testing lab and these services should be able to rely on a scientific government report when they are

relaying the report's results.[1] The duty plaintiffs propose would so chill debate that the freedom of speech would be at risk. Accordingly,

IT IS ORDERED that:

1. Plaintiffs' Motion to Strike Expert Testimony, Ct. Rec. 172, be and the same is hereby **DENIED**.

2. Plaintiffs' Motion for Partial Summary Judgment, Ct. Rec. 171, be and the same is hereby **DENIED**.

3. Defendants' Motion for Summary Judgment, Ct. Rec. 164, be and the same is hereby **GRANTED**.

The Clerk is directed to file this Order, enter judgment for defendants, provide copies to counsel and **CLOSE THIS FILE**.

DATED this 13 day of September, 1993.

/s/ Wm. Fremming Nielson

Wm. Fremming Nielson
United States District Judge

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[1] Conceivably the EPA report was incorrect, but in that case, plaintiffs' dispute would be with the government decision and not CBS' reporting of the same.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

GRADY AUVIL and LILLIE AUVIL, husband and wife, et. al., Plaintiffs,	)	No. CS-90-0553-WFN
v.	)	
	)	ORDER
CBS "60 MINUTES", a foreign corporation, etc., et al., Defendants.	)	

Currently pending is plaintiffs' motion to remand and defense motions to dismiss or in the alternative for summary judgment.

I. Transactional Events

On February 26, 1989 the CBS television program "60 Minutes" aired a segment highly critical of daminozide, more commonly known by its tradename as Alar. Alar was commonly used in the apple industry as a growth regulator. By maintaining the fruit on the tree longer, cosmetic appearance is improved, fruit disorders are reduced, size is increased and storage life is enhanced. Various public interest groups, among them the Natural Resources Defense Council (NRDC), expressed concern over research which indicated that Alar chemically degrades into unsymmetrical dimethylhydrazine (UDMH), a carcinogen. Alar cannot be washed off the fruit, nor will peeling remove it. The substance remains in the flesh of the apple regardless of processing procedures.

The risk falls hardest on children who are the largest consumers of apple products. Based on these findings, the maxim "an apple a day keeps the doctor away" lost its appeal in the eyes of NRDC. "60 Minutes" investigated a report published by NRDC and centered a broadcast around those concerns narrated by Ed Bradley.[1] The credibility of the report was bolstered by an interview with the acting director of the Environmental Protection Agency, Dr. Moore. While minimizing the severity of risk, Dr. Moore confirmed that Alar was indeed a health hazard and noted that under today's rigorous certification standards, the chemical would not be approved for use.

"60 Minutes" did not employ the term "red apples," but the visuals accompanying the spoken word left no doubt that red apples constituted the subject matter.[2] Nor was Washington State referenced by name, although thanks to a longstanding aggressive marketing approach taken by the Washington State Apple Advertising Commission (WSAAC), it is commonly known throughout the country, if not the world, that Washington is the prime producer of red apples.

The toxicity or lack thereof of hydrazines such as UDMH in general and Alar in particular has been the subject of raging debate in scientific and environmental circles for many years. *Nader v. United States E.P.A.*, 859 F.2d 747, 749-50 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989); *Renaud v. Martin Marietta Corp.*, 749

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[1] The text of the broadcast is set out in full as an appendix.

[2] The segment opens with a lengthy shot of a red delicious apple emblazoned with a skull and crossbones.

F. Supp. 1545, 1546-47 (D. Colo.1990). The striking "60 Minutes" presentation brought the controversy into the nation's living rooms and public reaction to the broadcast was dramatic and swift. Both sales and prices fell sharply, not only locally, but world-wide. Alar was taken off the market and after a vigorous educational campaign spear-headed by WSAAC, the industry eventually recovered. In the interim, growers and others dependent upon apple production sustained tremendous losses amounting to perhaps as much as $75 million dollars. Beyond immediate economic loss, growers forced into bankruptcy or work-out arrangements with lenders lost their homes and livelihoods. Those who survived intact saw their property values nosedive. Entire communities dependent upon the apple market were thrown into depression.

This suit followed. Styled as a class action brought on behalf of 4,700 Washington growers, it was filed in Yakima County Superior Court and thereafter removed. Named as defendants are "60 Minutes", CBS, three local CBS affiliates, KREM, KIRO and KIMA, as well as NRDC and Fenton Communications. The issues are two-fold: (1) does joinder of the local affiliates defeat diversity jurisdiction and thus require remand; and (2) if not, do plaintiffs have standing to maintain this action.

II. Analysis

While various facts are in contention, it goes without saying that all matters in controversy are taken in the light most favorable to the non-moving parties.

A. Remand:

It is undisputed that the affiliates exercised no editorial control over the broadcast. They had the power to do so by virtue of their contract with CBS. They in fact occasionally do censor programming when for one reason or another an affiliate believes the content unsuitable for local consumption; albeit, none had ever pre-empted "60 Minutes." In this case, however, all three merely served as a conduit. "60 Minutes" is aired nationwide at 7:00 p.m. on Sundays. To accommodate the time differential between the east and west coasts, the program is transmitted via satellite from New York to Los Angeles three hours prior to air time. Los Angeles then redistributes to stations on the west coast. The affiliates have both the right and the technical capability to access the broadcast during the three-hour hiatus. Also provided is a telexed communique setting out in general terms the nature of the subject matter. The local affiliates thus had some period of time in which to review programming and also some idea of the content. It is argued that these features, coupled with the power to censor, triggered the duty to censor. That is a leap which the Court is not prepared to join in.

With the possible exception of re-run movies, the content of which is already widely known and/or catalogued, plaintiffs' construction would force the creation of full time editorial boards at local stations throughout the country which possess sufficient knowledge, legal acumen and access to experts to continually monitor incoming transmissions and exercise on-the-spot discretionary calls or face $75 million dollar lawsuits at every turn. That is not realistic.

The rule in Washington remains that "a person who re-

publishes defamatory statements made by another does not escape liability for the defamation even though the republisher is careful to ascribe the statements to the original speaker." *Herron v. Tribune Pub. Co.*, 108 Wash. 2d 162, 178, 736 P.2d 249 (1987). The threshold inquiry is whether a local broadcaster who serves as a mere conduit "republishes" by relaying an unedited feed. The concept of republication is broad in this jurisdiction. *See LaMon v. City of Westport*, 44 Wash. App. 664, 668, 723 P.2d 470 (1986), *rev. denied*, 112 Wash. 2d 1024 (1989), *cert. denied*, 493 U.S. 1074 (1990); *see also*, Restatement (Second) of Torts § 581 at Comment g. Accordingly, it will be assumed for purposes of disposition that the local affiliates did republish within the meaning of Herron. At the same time, however, there is no liability for any defamation absent fault. *LaMon v. Butler*, 112 Wash. 2d 193, 197, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989).

The Washington approach is thus consistent with the general rule that there is no "conduit liability" in the absence of fault. *Lewis v. Time*, 83 F.R.D. 455, 463-64 (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983). "One who only delivers or transmits defamatory material published by a third person is subject to liability if, but only if, he knows or had reason to know of its defamatory character." *Dworkin v. Hustler Magazine, Inc.*, 634 F. Supp. 727, 729 (D. Wyo. 1986)(quoting Restatement (Second) of Torts § 581). While the above-cited decisions deal with liability vis-a-vis book sellers, there is no logical basis for imposing a duty of censorship on the visual media which does not likewise attach to the print chain of distribution. *Auvil v. CBS "60 Minutes"*, 140 F.R.D. 450, 451-52 (E.D. Wash. 1991). *Cf., Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 139-40 (S.D.N.Y. 1991) (computerized data library not responsible for passing on

libelous statements absent fault). The sum total of what the affiliates knew prior to air time is set out below:

> A is For Apple -- Ed Bradley reports on the inability of federal regulators (sic) eliminate known carcinogenic chemical sprayed on produce. (Shot in Seattle, Spokane; Minneapolis; Portland O.; Albany; Boston and Washington.)

Upon reviewing that telex, the affiliates might well reason that the program would discuss apples and cancer. They might further conclude that the broadcast would be of significant local interest in Washington State. They might suspect also that apple growers would prefer the broadcast not be shown. There was not a hint, however, that the content would be defamatory. All defamatory material may be controversial, but the converse is not true.

More than merely unrealistic in economic terms, it is difficult to imagine a scenario more chilling on the media's right of expression and the public's right to know. *Auvil, supra*, 140 F.R.D. at 452; *see also, Lerman v. Flynt Dist. Co., Inc.*, 745 F.2d 123, 139 (2nd Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985). Persons injured by defamatory material are not impaired by limiting conduit liability to those situations where culpability is established. The generating source, which in a national broadcast will generally be the deepest of the deep pockets, may still be called upon to defend.

Finally, it would be anomalous to impose different duties on broadcasters depending upon their geographic locations. An affiliate in Washington had three hours lead time. A station in Florida had none. A station in Iowa had one hour. Should varying obligations devolve upon

each simply because of their physical situs?

Accordingly, summary judgment will be entered in favor of KREM, KIRO and KIMA and the claims asserted will be dismissed with prejudice. That results in complete diversity as among all remaining parties and the motion to remand will be denied.

B. Product Disparagement vs. Defamation:

Disparagement and defamation are conceptually distinct torts. The latter deals with injury to the person; i.e., reputation and character. *In re Valley Forge Plaza Assocs.*, 113 B.R. 892, 911 (Bkrtcy. E.D. Penn.), *aff'd in part and rev'd in part*, 120 B.R. 789 (E.D. Penn. 1990). The former deals with pecuniary loss. *Id.* The distinction between the two has often proven troublesome from a semantical standpoint:

> "Trade libel," which has been defined by one California court as "an intentional disparagement of the quality of property, which results in pecuniary damage to plaintiff" is a confusing concept that has not been subjected to rigorous judicial analysis in California. The confusion arises primarily from uncertainty whether "trade libel" should be treated as a species of defamation, as all parties herein appear to believe, or instead constitutes the distinct tort of injurious falsehood, which "usually involves the publication of matter disparaging to the property in land, chattels or intangible rights or disparaging to their quality."
>
> * * * * * *
>
> As the Restatement points out, and as the com-

> mentators agree, the torts of injurious falsehood and defamation protect different interests and have entirely different origins in history. The action for defamation is to protect the personal reputation of the injured party; it arose out of the old actions for libel and slander. The action for injurious falsehood is to protect economic interests of the injured party against pecuniary loss; it arose as an action on the case for the special damage resulting from the publication.
>
> * * * * * *
>
> Thus, despite the fact that what has come to be known as "trade libel" is similar to defamation in that both involve the imposition of liability for injuries sustained through publication to third parties of a false statement affecting the plaintiff, the two torts are distinct; that is, *"trade libel" is not true libel and is not actionable as defamation.*

Polygram Records, Inc. v. Superior Court (Rege), 170 Cal. App. 3d 543, 548-49, 216 Cal. Rptr. 252, 254-55 (Cal. App. 1985)(emphasis added, citations omitted), cited with approval in *Aetna Cas. & Sur. Co. v. Centennial Ins. Co.*, 838 F.2d 346, 351 (9th Cir. 1988).

Because the conceptual underpinnings are distinct, it would not be surprising were the elements of proof different as well, and that is in fact the case. *Id.*; *see also, Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404, 408-09 (E.D. Pa. 1983). Plaintiffs' argument is thus well taken that case law addressing defamation cannot always be bodily picked up and applied to disparagement. One must ask what rights were transgressed and what injury sustained. One must also look to the gloss placed on these

two torts by state law.

That the elements are distinct, however, does not mean the law of defamation is irrelevant. Elements aside, there is one uniform federal standard founded on the First Amendment which will vitiate liability for publicity which might otherwise be defamatory or disparaging in nature:

> *Unelko* also argues that its claims for product disparagement, or "trade libel," and for tortious interference with business relationship were improperly dismissed. These claims, however, are subject to the same first amendment requirements that govern actions for defamation.

Unelko Corp. v. Rooney, 912 F.2d 1049, 1057-58 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1586 (1991).

Among the prophylactic rules designed to serve First Amendment values is the threshold requirement that the injured party demonstrate that the defamatory (or as here disparaging) communication was personally directed to him or (as here) to the product. *Rosenblatt v. Baer*, 383 U.S. 75, 81-82 (1966). Known as the "of and concerning" principle, it requires a showing that the offending language pertains directly to a particular individual or product whose identity can be ascertained from the text (and context) of the publication. *Barger v. Playboy Enterprises, Inc.*, 564 F. Supp. 1151, 1153 (N.D. Cal. 1983), *aff'd*, 732 F.2d 163 (9th Cir. 1984), *cert. denied*, 469 U.S. 853 (1984).

Counsel concedes, as he must consonant with his duty of candor, that were this a defamation action, no single grower in the putative class could satisfy the "of and concerning" requirement:

> Plaintiffs do not claim that they, as individuals, were singled out in the 60 Minutes segment; rather, the group which they comprise -- *the* major producer of red apples in the United States, was indisputably implicated in the program and harmed thereby.

Plaintiffs' Memorandum at 17 (emphasis in original).

Growers were not referenced in the subject broadcast except in the most tangential sense.[3] The target was not the growers and no reasonable viewer would construe the broadcast in that manner. The target was agricultural use of hazardous substances with the emphasis on Alar. Because Alar physically merges with the fruit, it was the apples which got hit. By derivation, so did the growers.

Plaintiffs contend that although no grower standing alone meets the "of and concerning" test, taken as a unit they do:

> The accurate identification of the plaintiff herein distinguishes the myriad authorities relied upon by *these* defendants. In those cases, specific individual members of large groups claimed they were specially injured as a result of defamation leveled at the group. Here, the group claims that it is injured and seeks redress.
>
> * * * * * *

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[3] There was a reference to Mexican growers who actually sprayed their field hands with hazardous chemicals. There was also a reference to then-existing law requiring a balancing of the potential health hazard against the economic benefit to growers. That is the sum total of such references.

> Contrary to the narrowly defined "plaintiff" urged by defendants, the true plaintiff herein is the Washington State red apple producing market, one of six major apple producing markets in the United States.

Plaintiff's Memorandum at 17-19 (emphasis in original).

That is a good effort, but plays the game according to defendants' rules and leads inexorably into the semantical quagmire which *Polygram, supra*, cautions against. The individual/group dichotomy is not meaningful when disparagement is at issue. The case law on occasion reflects a tendency to gloss over the distinction between defamation and disparagement, and to treat the latter identically with the former. *See, e.g., National Nutritional Foods Ass'n v. Whelan*, 492 F. Supp. 374, 381 (S.D.N.Y. 1980). Defendants point to such under-analyzed decisions for the proposition that because no grower was identified by name, the broadcast was not "of and concerning" any individual grower nor the group as a whole. That is no doubt true. The relevance of the observation, however, is elusive.

This case is not about personal defamation. The broadcast did not suggest that growers were evil or irresponsible or even incompetent. On the contrary, the use of Alar was a common agricultural practice and had been for more than two decades. To the extent that moral culpability was even hinted at, the target was the government which was aware of the risks but declined to cancel the Alar registration and took only minimal steps to reduce allowable exposure. *See Nader, supra*, 859 F.2d at 749-50. Thus, the fact that no grower was identified seems an idle point. Plaintiffs are not suing because they were defamed. They are suing because their product was disparaged. Suppose hypothetically that the following bit had

been part of the broadcast segment.

> [Camera pans small orchard, coming to rest on a farm house.] Voice over: Grady Auvil and his family have called this home for twenty years. That is them standing in the front yard.
>
> Bradley: Mr. Auvil, we spoke by phone earlier about the Alar controversy. Would you like to share your thoughts with our viewers?
>
> Auvil: Yes, Ed. I've read the NRDC report and I'm just sick. Not only because of the economic impact adverse publicity might have on my family and this entire region, but because for twenty years I figured I was raising a wholesome product and it turns out I've been giving kids cancer. All with the blessings of the United States government.

With a specific grower now identified, can it be said that Mr. Auvil meets the "of and concerning" test? No doubt. But consider what result if that bit were followed by the colloquy hypothesized below:

> [Camera pans apple packing facility. Bradley and Auvil are walking through the building]. Bradley: Wow, that's a lot of apples. Grady, would you point out yours?
>
> Auvil: Can't do that Ed. Some of these apples are mine, but apples aren't like cattle. We don't brand them at the orchard.
>
> Bradley: So when you and possibly a hundred other small growers bring your apples here they're just

lumped altogether? You can't tell which ones are yours?

Auvil: Nope.

Bradley: You agree that your apples constitute a health hazard. How do we tell the difference between a carcinogenic apple and a safe one?

Auvil: You can't.

Bradley: Assume you are one of a hundred growers in the valley. No one else uses Alar. Only you. What are the odds that this apple I am picking up is carcinogenic? One percent?

Auvil: Simple math.

Bradley: But you're not the only grower in the valley who uses Alar, are you?

Auvil: Nope.

Leaving hypotheticals behind, that was the ultimate message of the broadcast. No grower was identified by name, but it was clear that at least some growers must be using Alar because more than 70% of the samples tested contained daminozide, and levels were unacceptably high 15% of the time. Lest anyone miss the point, Dr. Groth of the Consumers Union emphasized the universal nature of the hazard with his "supermarket roulette" comment:

Bradley: So when a parent goes to the grocery store looking for an apple product that does not contain daminozide, how do you do that?

> Dr. Groth: It's a supermarket roulette. You don't know. The consumer can't tell by looking at the [apple juice] bottle whether it's got daminozide in it or not, and unfortunately, the consumer can't tell by depending on the manufacturer's assurance that they're using daminozide-free apples, because we've shown that isn't valid in all cases.

The broadcast was clearly "of and concerning" daminozide-laced apples. More broadly yet, it was "of and concerning" all apples whether treated with Alar or not. To the extent that identification of growers is relevant at all, every apple grower in the country was identified. Their products were identified as dangerous regardless of whether the fruit had been exposed to Alar.[4]

C. Group Libel:

Counsel have not cited, and the Court has not found, a case holding that group libel does not apply to disparagement claims. A few decisions have been located which

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[4] Which takes the case out of the rule of *California Canners & Growers Ass'n v. United States*, 7 Cl. Ct. 69 (1984). That decision involved a governmental ban on cyclamates. The chemical was used in a vast panoply of food products. No one had an unkind word for the products, only the cyclamates. The Court thus noted the general rule that derogatory publicity directed only to the chemical and not the products would fail the "of and concerning" test. *Id.* at 86 & 118. Here, not only were apples specifically referenced, but all apples were targeted as suspect even if Alar-free. Plaintiffs represent that only about 10% of Washington apples were treated with Alar during the relevant time frame. That is not inconsistent with NRDC estimates.

arguably (albeit sub silentio) hold to the contrary. *See, e.g., Whelan, supra*, 492 F. Supp. at 381. There is room to question whether the group libel doctrine finds application in a disparagement action. Two theories underlie the concept.

The first is that of dilution. *Brady v. Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786, 788-89, 84 A.D.2d 226, 228-230 (N.Y.A.D. 1981). If a class is sufficiently broad, no one member really suffers personal injury. For example, the slur "all lawyers are shysters" may be offensive to those lawyers who are not, but no attorney could reasonably complain that he personally has sustained damage to his character and reputation by operation of such a vacuous generality. *Michigan United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 898-99 (W.D. Mich. 1980), *aff'd*, 665 F.2d 110 (6th Cir. 1981); *see also, Khalid Abullah Tariq Al Mansour Faissal Fahd Al Talal v. Fanning*, 506 F. Supp. 186 (N.D. Cal. 1980) (class of 600 million Muslims cannot claim each member defamed). In a disparagement action where pecuniary interests are at stake, there is no dilution. It would matter not a whit whether all of the apple orchards in the state were owned by a single corporation or, as here, by thousands of "ma and pa" operations. The injury would be the same. The injury is merely distributed among a larger universe.[5]

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[5] For example, suppose the broadcast occurred just as it did but instead of apples, the subject was pineapples. While the grower is not identified, the public can hazard a decent guess as to who it is. Why the Dole Pineapple Company should escape the group libel rule but the plaintiffs in this action should not lacks a ready answer.

The second theory involves identification. When an entire class is defamed, it is usually difficult to show that class-wide allegations could be said to be directed to each individual. *See, e.g., Schuster v. U.S. News & World Report, Inc.*, 602 F. 2d 850, 854 (8th Cir. 1979). Thus, the general rule is that either: (1) the class must be small enough so that the derogatory communication may be reasonably understood to apply to each class member; or (2) the circumstances of the publication reasonably suggest that some particular member was targeted. *Sims v. KIRO*, 20 Wash. App. 229, 236, 580 P.2d 642, *rev. denied*, 91 Wash. 2d 1007 (1978), *cert. denied*, 441 U.S. 945 (1979). While universally accepted and applied in defamation actions, the concept does not mesh neatly with disparagement theory. True, "every apple in the United States" is a fair sized class, but for reasons addressed *supra*, the broadcast clearly targeted every apple in the United States whether it was treated with Alar or not. Certainly, that is how the consuming public viewed the broadcast judging from the dramatic decline in demand. *See United Medical Laboratories v. Columbia Broadcasting System*, 404 F.2d 706, 708-09 (9th Cir. 1968) (postpublicity effect on business probative of whether unidentified class member impugned), *cert. denied*, 394U.S. 921 (1969). This is not a case of generalization when "all lawyers are shysters" or "all hunters are cruel." The message "apples give kids cancer" sounds an explicit, particularized and unmistakably concrete alarm to the consuming public to run, not walk, away from that apple stand.

The doctrine of group libel has obvious utility in the defamation arena as evidenced by its universal endorsement. A parallel rule may be useful in disparagement actions provided that one of the goals of the doctrine is served thereby; for example, if the product actually dispar-

aged is not sufficiently identified or if injury is in fact diluted. Blindly applying the concept to all disparagement cases, however, would be tantamount to counseling potential disparagors that they are home free if only they succeed in wreaking damage on a sufficient number of manufacturers.

D. The New York Times Standard:

In the defamation context, the general rule is that if the defamee is a public figure, the burden of proof shifts to the plaintiff and is greatly heightened. Not only must the objectionable statement be proven false, but it must have been made with actual malice. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). That is a stout standard requiring either willfulness or at least reckless disregard for the truth. *Id.* Even substantial truth will defeat allegations of falsity. *Unelko, supra*, 912 F.2d at 1057. In Washington, the public/private figure distinction becomes less relevant. The burden of proof is always on the plaintiff, and in the case of a media defendant, the burden of establishing fault must be met by clear and convincing evidence. *See LaMon, supra*, 112 Wash. 2d at 197-98, 770 P.2d 1027; *see also, id.* at 205, *et seq.*, 770 P.2d 1027 (Utter, J., dissenting).

Some courts have applied the same rule in the disparagement context if the subject matter is of grave public concern. *See Whelan, supra*, 492 F. Supp. at 382. The validity of that proposition is an open question in Washington. *See LaMon, supra*, 112 Wash. 2d at 198, 770 P.2d 1027. It would be difficult to conceive of an issue of greater public import than the presence of carcinogenic substances in the nation's food supply. *Cf., Unelko, supra*, 912 F.2d at 1056. That would seem particularly so when

the largest segment of consumers consists of children. The same result has obtained when the manufacturer is deemed a public figure. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 489-90 (1984).

Questions of public interest and public figure aside, the necessity of establishing both falsity and scienter or recklessness is the general rule in disparagement actions.[6] Restatement (Second) of Torts § 623A(b); *Ruder & Finn Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 670-71, 439 N.Y.S.2d 858, 862, 422 N.E.2d 518, 522 (1981). These stringent burdens pre-existed *New York Times* at common law. W. Prosser, *The Law of Torts*, § 128, p. 920 (4th ed. 1972). Those burdens are probably constitutionally required. *Simmons Ford, Inc. v. Consumers Union of U.S., Inc.*, 516 F. Supp. 742, 744 n. 4 (S.D.N.Y. 1981); *Blatty v. New York Times Co.*, 42 Cal.3d 1033, 1043, 232 Cal. Rptr. 542, 548, 728 P.2d 1177, 1183 (1986), *cert. denied*, 485 U.S. 934 (1988); see also, § 623A at Comment d. Moreover, although case law on point is sparse, it would appear from such meager guidance as is available that Washington recognizes the increased burden faced by one whose product is disparaged but whose reputation is not defamed. *Waechter v. Carnation Co.*, 5

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[6] Which probably explains why plaintiffs continue to urge a "group defamation" theory rather than squarely characterize the action as what it is: a products disparagement case.

Wash. App. 121, 126-27, 485 P.2d 1000 (1971).[7]

Accordingly, plaintiffs will be required to establish their case in compliance with the Restatement standard. While the instant motions address the broad panoply of libel and disparagement concepts, falsity and malice are not among them. Presumably, discovery remains to be accomplished prior to framing the issues.

THEREFORE IT IS ORDERED that:

(1) Motions for summary judgment brought by KREM, KIRO and KIMA are GRANTED.

(2) Plaintiffs' motion to remand is DENIED.

(3) The motion of CBS and CBS "60 Minutes" to dismiss or in the alternative for summary judgment is DENIED.

(4) The motion of NRDC and Fenton Communications raises a far closer question as to whether the "of and concerning" requirement has been met and will be addressed in a separate Order.

(5) The public interest is best served by expeditious disposition of cases raising First Amendment issues. *Dor-*

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[7] *Waechter* is no longer good law for its treatment of defamation. *See generally, LaMon, supra*, 112 Wash. 2d at 197-98, 770 P.2d 1027 (prevailing elements and standards). The decision is cited only for the proposition that even when defamation could be established under the more relaxed criteria of yesteryear, the tort of disparagement was viewed with greater stringency.

sey v. National Enquirer, Inc., 952 F.2d 250, 254 (9th Cir. 1991); *Mark v. Seattle Times*, 96 Wash. 2d 473, 484-87, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982). The laggardly pace which has characterized this action thus far should not continue. The parties will be given ninety days in which to make further discovery on the falsity and malice issues. Discovery will be confined solely to that context and counsel will be expected to offer one another maximum cooperation in meeting this schedule. At the conclusion of ninety days, renewed motions may be filed and they will be heard and decided as quickly as the parties can be ready.

DATED this 5th day of June, 1992.

/s/ Wm. Fremming Nielson

Wm. Fremming Nielson
United States District Judge

APPENDIX

"A" Is For Apple

BRADLEY: The most potent cancer-causing agent in our food supply is a substance sprayed on apples to keep them on the trees longer and make them look better. That's the conclusion of a number of scientific experts. And who is most at risk? Children, who may someday develop cancer from this one chemical called daminozide. Daminozide, which has been sprayed on apples for more than 20 years, breaks down into another chemical called UDMH.

[voice-over] The EPA's acting administrator, Dr. Jack Moore, acknowledged that the EPA has known about the cancer risk for 16 years.

Dr. JACK MOORE: There's no question if it was a new chemical, not yet on the market, and it was brought to the agency to be evaluated, that it would not get on the market, based on the data that was available.

BRADLEY: Dr. Moore, I can't understand that. I mean, you're telling me something -- that if this stuff came to you today, and it was brand new, it wouldn't get on the market, but because it's already out there, we can keep using it? That doesn't make sense to me.

Dr. MOORE: You've just identified one of the paradoxes of the statute. Once a pesticide gets its license, gets its registration, is on the market, despite what everybody what might think, the burden of carrying unreasonable risk finding basically goes on to the government. All right?

BRADLEY: But you see, a lot of these chemicals--

Dr. MOORE: Prior to that--

BRADLEY: --got on the market when we didn't know that they were cancer-causing agents.

Dr. MOORE: --yes, you're correct.

BRADLEY: And they're on the market now. We know that they do cause cancer.

Dr. MOORE: Correct.

BRADLEY: But you say we can't take them off because they're already on the market, and they went on the market when we didn't know they caused cancer.

Dr. MOORE: That's the paradox of the statute.

BRADLEY: That's crazy!

Dr. MOORE: We ought to change the statute.

BRADLEY: Is it fair to say, then, Dr. Moore, that there are laws on the books that are putting all of us--particularly our children--at risk?

Dr. MOORE: Could be. Could be.

BRADLEY [voice-over]: While Dr. Moore blames a law, which requires him to balance the health risk to the public against the economic benefits to the growers, Congressman Jerry Sikorsky blames the EPA.

Rep. JERRY SIKORSKY: They have two laws. One is the Food and Drug and Cosmetic act that says quite clearly if this -- if this chemical causes tumor in laboratory animals -- not malignant tumors, any kind of tumors -- it's supposed to be pulled off the market.

BRADLEY: Jack Moore, the deputy administrator of the EPA, says that he'd like to take it off the market, but he's afraid that the manufacturer, Uniroyal, that makes this chemical, could successfully sue the EPA if he did so.

Rep. SIKORSKY: So let them sue. That's his job. He's with the Environmental Protection Agency. Go to a cancer ward at any children's hospital in this country. See

these bald, wasting-away kids. And then make a decision as to whether the risks balance over the benefits.

BRADLEY [voice-over]: Kids are at a high risk from UDMH because they drink so much apple juice. The average preschooler drinks 18 times more apple juice than his or her mother. If those apples were treated with daminozide, the cancer risk is perilously high. Janet Hathaway is a senior attorney for the Natural Resources Defense Council.

JANET HATHAWAY: What we're talking about is a cancer-causing agent used on food that EPA knows is going to cause cancer for thousands of children over their lifetime.

BRADLEY [voice-over]: Uniroyal Chemical, which makes daminozide under the trade name Alar, declined to be interviewed for this report. But in a letter they said "... any risk from daminozide or UDMH, if it exists, is negligible." Nonetheless, preliminary results from Uniroyal's own study already show high levels of cancer in laboratory animals. Janet Hathaway's organization, the Natural Resources Defense Council, has just completed the most careful study yet on the effect of daminozide and seven other cancer-causing pesticides on the food children eat.

Ms. HATHAWAY: Just from these eight pesticides, what we're finding is that the risk of developing cancer is approximately 250 times what EPA says is an acceptable level of cancer in our population.

BRADLEY: Two hundred fifty times?

Ms. HATHAWAY: That's right. What that means is that over a lifetime, one child out of every 4,000 or so of our preschoolers will develop cancer just from these eight pesticides.

BRADLEY: And the EPA says acceptable limit is one out of--

Ms. HATHAWAY: One out of a million, they say, is acceptable.

BRADLEY: Are they scaring people needlessly? Are they fearmongers?

Dr. MOORE: Well, there's no question, if the risk is greater than the one in a million calculation, it's a cause for concern to this agency.

BRADLEY: Now, you've had a chance to look at the NRDC study. It says children are being exposed to a pesticide risk several hundred times greater than what the agency says is acceptable.

Dr. MOORE: Risk unacceptable, yes. The magnitude of risk is less by our calculation than apparently they calculate.

BRADLEY [voice-over]: Dr. John Graef, a professor of pediatrics at Harvard Medical School, also reviewed the study by the Natural Resources Defense Council.

Dr. JOHN GRAEF: I think that, by and large, the basis of the report is sound. I think the principles it's based on are very sound, which is that children clearly are subject to very large exposures to these chemicals, that

they are at significant risk, that they are at greater risk than our adults. I may quibble a little bit with the calculations, but that quibbling doesn't get away from the basic point, that the FDA regulations or the FDA surveillance and the EPA regulations are not addressing the danger to children.

BRADLEY [voice-over]: The FDA, the Food and Drug Administration, is supposed to monitor pesticide residues in our food, including residues of the apple spray UDMH.

[interviewing] Do you have any idea on which vegetables, which products, which fruits have been tested in the last couple of years for UDMH?

Dr. MOORE: Well, we have that--that data. I don't have it all on my fingertips.

BRADLEY: Two jars of grape jelly, one piece of cherry candy. That's not very reassuring.

Dr. MOORE: Well, the data speak for themselves. Ed, there's no question that the level of resource that's available to FDA does not allow one to have a meaningful presence every day on every commodity.

BRADLEY [voice-over]: Some of the danger from pesticides comes from growers outside the U.S. who ignore pesticide laws altogether. Here's one in Mexico who was caught spraying toxic chemicals on his own workers. Bad for the workers, and hardly reassuring for us, considering that most of our winter vegetables come from Mexico. And what kind of job is the Food and Drug Administration doing to ensure that pesticide-contaminated food doesn't

reach us? We went to the border checkpoint in Laredo, Texas, with Congressman Sikorsky.

[interviewing] What's the likelihood that if one of those loads contains pesticides that are actually banned in the United States, that the FDA is going to catch it right here at the border?

Rep. SIKORSKY: Almost nil. Nothing. Zip.

BRADLEY [voice-over]: Congressman Sikorsky's committee held hearings on how the FDA monitors pesticide residues.

[interviewing] If they do flag someone and decide that they want to make a test, how long does it take to find out if there's a problem?

Rep. SIKORSKY: The average in our hearing in '87, we found out, was 28 days.

BRADLEY: Twenty-eight days?

Rep. SIKORSKY: Twenty-eight days. Now it's down to maybe two to three weeks. And by then this fresh produce is likely to have been already stocked and consumed.

BRADLEY [voice-over]: We looked for the food and drug inspector at this border crossing, but he was nowhere in sight. That's not surprising. One FDA agent is supposed to monitor four separate border crossings, spread over 400 miles. And if that's not bad enough, the FDA's routine tests for pesticide residues don't even pick up half of the most dangerous ones.

One of the cancer-causing pesticides the FDA's routine test doesn't pick up at all is benamil.

[interviewing] Of the 50 or 60 billion pounds of bananas that came into the United States over an eight-year period, do you know how many bananas the FDA sampled for the carcinogenic pesticide that's known as benamil?

Dr. MOORE: Not specifically, but my--having sat through Senate testimony early in the year, I think the answer might be one.

BRADLEY: Two.

Dr. MOORE: Two.

BRADLEY: Two. Not two boatloads, two truckloads, two bunches. Two bananas. Are you comfortable with that?

Dr. MOORE: I would certainly like to see greater sampling for benamil in this case.

BRADLEY [voice-over]: Like benamil on bananas, daminozide on apples can't be washed or peeled off. When apples are processed, say for apple juice or apple sauce, daminozide quickly turns into UDMH, a more dangerous chemical which-- believe it or not--is also rocket fuel.

Just two weeks after we first interviewed him, the EPA's Dr. Moore took another look at the evidence and decided to start the process of banning daminozide after all. But that process could take five years. So we returned to Washington to ask him why he doesn't just declare

daminozide an imminent hazard, and suspend it right away, which the law does allow him to do.

[interviewing] If the risk is unacceptable, by your own admission, you have the authority, under the law today, to make it and declare it an imminent hazard and get rid of it.

Dr. MOORE: In rare instances you might have a risk that is so provocative that you do not want to allow this chemical to stay on--in use during the period of the cancellation process. They then allow for suspension action. In our opinion, the--the data that we have in hand is not sufficiently provocative to allow us to make that suspension finding.

BRADLEY: I'm not a scientist, but if you're telling me that this stuff is 50 times more dangerous, the levels are 50 times higher than what you say is acceptable, that says to me that's a problem, Dr. Moore. That says to me that if we are protecting the environment, protecting us, you take it off.

Dr. MOORE: Ed, we aren't debating whether or not there's a problem here. What we're debating is the pace by which one should get it off the market. We have concluded that it's a problem, it should come off the market. We think under the existing law, the--the avenue that's available to us is through a normal cancellation as opposed to an accelerated suspension.

Ms. HATHAWAY: If EPA doesn't think that the most potent cancer-causing chemical in our food supply is grounds enough to declare an imminent hazard and remove it from food, well, I don't know what kind of risk it takes, then, to declare a chemical an imminent hazard.

BRADLEY: From the time the first red flag went up, it will have taken 19 years to get this stuff off the market and out of the food supply.

Dr. MOORE: That's correct, based on the original studies back in the '70s.

Ms. HATHAWAY: They have the opportunity to suspend the use of the chemical today, if they want to do it. And they're not doing it. Instead, they're telling us that maybe over a few years they'll slowly ease this out of the food supply.

BRADLEY: How much daminozide is still in the food supply? The last time the government checked, in 1986, it was in 80 percent of processed apple products. Since then, most food processors say they no longer use apples treated with daminozide. Well, this week we spoke to Consumers Union, which publishes Consumer Reports magazine. They had a laboratory analyze 32 samples of apple juice that were on the market last year. Consumers Union scientist Dr. Ned Groth says there is less daminozide than there was three years ago, but there's still plenty out there.

Dr. NED GROTH: Out of 32 samples we analyzed, five had significantly higher levels of daminozide than you would have thought, and two-thirds of them had some daminozide. Only nine out of 32 had no detectable daminozide.

BRADLEY: Did you find daminozide in any of the products whose manufacturers claim they no longer use daminozide-treated apples?

Dr. GROTH: Yes. All of the products that we found daminozide in were from manufacturers who had made that statement to use previously, that they don't use daminozide-treated apples.

BRADLEY: So after they told you they don't use it, you studied their products.

Dr. GROTH: What our tests show is that manufacturers who have made that promise are not succeeding at keeping daminozide out of their products. Not all manufacturers, but some are not succeeding.

BRADLEY: So when a parent goes to the grocery store looking for an apple product that does not contain daminozide, how do you do that?

Dr. GROTH: It's supermarket roulette. You don't know. The consumer can't tell by looking at the bottle whether it's got daminozide in it or not, and unfortunately, the consumer can't tell by depending on the manufacturer's assurance that they're using daminozide-free apples, because we've shown that isn't valid in all cases.

[Commercial break]

UNITED STATES CONSTITUTION
FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

. . . . .

(b) **For Defending Party**. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. . . .

. . . . .

(e) **Form of Affidavit; Further Testimony; Defense Required.** . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(2)

Supreme Court, U.S.
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No. 95-1372

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GRADY and LILLIE AUVIL, ROBERT and CHARLOTTE BRODY, BURT and ELLY CHESTNUT, BERT and EVELYN STENNES d/b/a SQUAW CREEK RANCH, INC.,
Petitioners,

v.

CBS "60 MINUTES", a foreign corporation, and COLUMBIA BROADCASTING SYSTEM (CBS), a foreign corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

BRUCE E. H. JOHNSON *
P. CAMERON DEVORE
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101
(206) 628-7683

SUSANNA M. LOWY
ANTHONY M. BONGIORNO
CBS Inc.
51 West 52nd Street
New York, New York 10019
(212) 975-8758
Counsel for Respondents

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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RULE 29.6 DISCLOSURE

Respondent CBS Inc., sued herein as CBS "60 MINUTES" and Columbia Broadcasting System (CBS), is owned by Westinghouse CBS Holding Co., Inc., which is owned by Westinghouse Electric Corporation. CBS Inc. has two nonwholly owned subsidiaries: CBS/Group W Television Sales Inc. and Station B Holdings Inc.

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STATEMENT OF THE CASE

A. *Introduction* [1]

In February 1989, respondent CBS Inc. ("CBS")[2] reported on 60 MINUTES that "Alar," a chemical sprayed on apples, had been found by the Environmental Protection Agency ("EPA") and the Natural Resources Defense Council ("NRDC") to be a potent carcinogen especially dangerous to children, and that Alar nevertheless remained on the market. Claiming damages as a result of the broadcast, eleven Washington State apple growers [3] filed suit against CBS. The District Court dismissed their case because petitioners failed to offer any evidence establishing Alar's safety and were also unable to prove that Alar does *not* cause cancer or that children were *not* at greater risk from exposure to Alar. The Court of Appeals affirmed, holding that petitioners had failed to meet their burden of proof under Washington law.

B. *The Regulatory History of Alar Before the February 1989 60 MINUTES Report*

Daminozide, known by its trade name "Alar," is a chemical pesticide that was applied to a variety of fruits and vegetables in this country from the late-1960s until 1989. 57 Fed. Reg. 46,436, 46,436 (1992). In 1989, Uniroyal Chemical Company ("Uniroyal"), Alar's manufacturer, voluntarily requested the cancellation of its registration for all food uses. *Id.* Alar cannot be visually observed, nor washed or easily removed from food. *Id.*

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[1] In this Brief, references to "CR" refer to the clerk's record as filed in the District Court. Citations in this Brief to appellants' or appellee's briefs refer to the briefs filed in the Court of Appeals.

[2] CBS is the respondent herein, having been named a defendant under the designations CBS "60 MINUTES" and Columbia Broadcasting System.

[3] The four remaining plaintiffs and their spouses are petitioners Grady and Lillie Auvil, Robert and Charlotte Brody, Burt and Elly Chestnut, and Bert and Evelyn Stennes d/b/a Squaw Creek Ranch, Inc.

During the sixteen years preceding the CBS broadcast, scientists had repeatedly uncovered evidence of the carcinogenicity of daminozide and of UDMH, a metabolite and breakdown product of daminozide.[4]

In 1973, Dr. Bela Toth published a study concluding that UDMH caused cancer in mice.[5] Studies in 1977[6] and 1978[7] confirmed that daminozide caused cancer in mice. In 1980, the EPA reviewed daminozide's registration and noted that "[b]oth [the Toth and National Cancer Institute ("NCI")] studies showed daminozide to be a carcinogen in mice."[8] The Agency, however, cancelled this review after discussions with Uniroyal.[9]

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[4] The broadcast discussed both of these components of the pesticide. This is inevitable, because daminozide contains UDMH as a contaminant and breakdown product. 57 Fed. Reg. 46,436, 46,437 (1992); CR 165, Ex. E, Rosen Dep. Ex. 145 (EPA, *Third Peer Review of Daminozide and its Metabolite/Breakdown Product 1,1 Dimethylhydrazine* 1 (July 26, 1991)) ("*Third Peer Review*") (UDMH is metabolite/breakdown product). When the EPA registers chemicals, it considers parent compounds as well as breakdown products. 40 C.F.R. §§ 158.153, 158.155.

[5] CR 165, Ex. E. Rosen Dep. Ex. 137 (B. Toth, *1,1-Dimethylhydrazine (Unsymmetrical) Carcinogenesis in Mice: Light Microscopic and Ultra-structural Studies on Neoplastic Blood Vessels*, 50 J. Nat'l Cancer Inst. 181 (1973)).

[6] CR 165, Ex. E, Rosen Dep. Ex. 138 (B. Toth et al., *Introduction of Tumors in Mice with the Herbicide Succinic Acid 2,2-Dimethylhydrazide*, 37 Cancer Res. 3497 (1977)), Ex. 139 (B. Toth et al., *The Large Bowel Carcinogenic Effects of Hydrazines and Related Compounds*, 40 Cancer Res. 2427 (1977)).

[7] CR 165, Ex. N (National Cancer Institute, *Bioassay of Daminozide for Possible Carcinogenicity*, National Cancer Institute Carcinogenesis Technical Report No. 83 (1978)).

[8] CR 165, Ex. BB (Letter from Marcia Williams, Director, EPA Special Pesticide Review Division, to Aceto Chemical Co. (Oct. 27, 1980)).

[9] CR 165, Ex. B, Slovic Dep. Ex. 22 (L. Zeise et al., *Alar in Fruit: Limited Regulatory Action in the Face of Uncertain Risks, in Analysis Comm'n & Perception Risk* 275, 277 (B.J. Garrick and W.C. Gekler eds. 1991)).

In 1984, EPA began the review process again.[10] In August 1985, an Agency peer-review committee reviewed all available toxicological data on daminozide and UDMH and reached the conclusion that both were class B_2, "probable human," carcinogens.[11] EPA then drafted a Daminozide Special Review Position Document 2/3/4 ("PD 2/3/4") for submission to a Scientific Advisory Panel in accordance with the procedures required by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y.[12] This position document reflected an unusually high degree of EPA concern.[13] In PD 2/3/4, the Agency identified both daminozide and UDMH as probable human carcinogens because of tumor incidence in multiple species of experimental animals.[14]

In 1985, a scientific advisory panel ("SAP") criticized EPA's position, claiming the animal cancer data relied on by the Agency in the PD 2/3/4 were insufficient to support a quantitative risk assessment.[15] The SAP criti-

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[10] Data available at that time indicated that daminozide was carcinogenic in laboratory mice and rats. 57 Fed. Reg. 46,436, 46,437 (1992). EPA was specifically concerned about risk from UDMH, "a known carcinogen in laboratory animals." *Id. See also* CR 165, Ex. DD (C. Haun et al., *Chronic Inhalation Toxicity of Unsymmetrical Dimethylhydrazine: Oncogenic Effects* (Oct. 1984)).

[11] CR 165, Ex. H, Farber Dep. Ex. 215 (EPA, *Second Peer Review of Daminozide (Alar) and UDMH (Unsymmetrical 1,1-dimethylhydrazine)* 2-3 (May 1989)) ("*Second Peer Review*").

[12] 57 Fed. Reg. 46,436, 46,437 (1992). According to 7 U.S.C. § 136w(d), EPA is required to submit proposed actions to a "scientific advisory panel" for comment.

[13] The PD 2/3/4 would have allowed EPA to propose and finalize its regulatory action in one step. The usual practice is to complete the process in two steps: a PD 2/3, which proposes a regulatory action, and a PD 4, which finalizes the action. 57 Fed. Reg. 46,436, 46,437 (1992).

[14] CR 165, Ex. T (EPA, *Draft Daminozide Special Review Position Document 2/3/4* II-29-30 (Sept. 12, 1985)).

[15] The SAP itself was later sharply criticized by a Senate Subcommittee. *See* CR 165, Ex. EE (*Government Regulation of Pesticides in Food: The Need for Administrative and Regulatory*

cized some aspects of the Toth studies and requested additional data.[16] EPA had previously noted these concerns,[17] and an independent review performed at EPA's request validated the basic conclusions of the first Toth study.[18]

Following an additional evaluation of the various cancer studies in August 1985, moreover, an EPA Peer Review Committee noted

> that both Alar and UDMH produced significant increases in oncogenic responses at multiple tissue sites in different experiments in multiple species and strains of animals.[19]

Reform, Report by the Subcomm. on Toxic Substances, Environmental Oversight, Research and Development to the Senate Comm. on Environment and Public Works, S. Rep. No. 55, 101st Cong., 1st Sess. 36, 61-62 (1989)); CR 165, Ex. B., Slovic Dep. Ex. 36 (S. Jasanoff, *EPA's Regulation of Daminozide: Unscrambling the Messages of Risk*, 12 Sci. Tech. & Hum. Values 116, 118-20 (1987)).

[16] 57 Fed. Reg. 46,436, 46,437 (1992); CR 165, Ex. E, Rosen Dep. Ex. 147 (EPA Mem. from William Pepelko through William Farland, Director Carcinogen Assessment Group, to Eileen Claussen, Director Characterization and Assessment Division at 1 (Jan. 9, 1987)) (*"Pepelko Memorandum"*).

[17] *See* CR 165, Ex. C., Wilkinson Dep. Ex. 62 (Transcript of Proceedings: EPA, Scientific Advisory Panel at 2). Similar arguments by petitioners' expert, Dr. Christopher F. Wilkinson, were rejected by the New York State Department of Health in 1986. *See* CR 165, Ex. CC (*Resp. to Dr. Wilkinson's March 27, 1986 Comments on the N.Y. State Dept. of Health's "Qualitative Assessment of the Carcinogenicity of Daminozide and UDMH in Rodents"*) (*"New York Response"*).

[18] CR 165, Ex. E, Rosen Dep. Ex. 144 (D. Goodman, *Review of Blood Vessel Neoplasms and Neoplasms of Lung, Kidney, and Liver in Swiss Mice Administered 1,1-Dimethylhydrazine in Drinking Water* (Aug. 1985)).

[19] CR 165, Ex. S (EPA, *Peer Review of Daminozide (Alar) and UDMH (Unsymmetrical 1,1-Dimethylhydrazine)* 8 (undated)) (*"Peer Review"*). The Committee also noted that sufficient experimental data established that "[b]oth Alar and UDMH produce identical tumor types at the same organ sites," that "[t]he principal types of tumors . . . produced by oral administration of Alar to Swiss mice have also been observed following the oral administration of other structurally-related hydrazine compounds to Swiss

The Peer Review Committee agreed with the Agency's conclusion that both Alar and UDMH were "B2 category" carcinogens—*i.e.*, probable human carcinogens.[20]

In 1987, as public concern was mounting,[21] EPA's Carcinogen Assessment Group conducted yet another review of UDMH data, again stating that

> the evidence is more than adequate to classify [UDMH] as a carcinogen in animal test systems and a B2 chemical using EPA's weight-of-evidence classification system.[22]

In January 1989, the Agency estimated, based on interim results of Uniroyal's own animal bioassay studies, that the dietary risk to the general population from daminozide/UDMH was 4.9×10^{-5}, or 5 incidents of cancer in a group of 100,000 people—which was 50 times the acceptable risk.[23] 57 Fed. Reg. 46,436, 46,437

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mice," that the Alar breakdown product and metabolite "UDMH is mutagenic *in vitro*," and that UDMH "is present as a residue on Alar-treated foodstuffs that are consumed by humans." *Id.* at 7-8.

[20] *Id.*

[21] In 1986, for example, the American Academy of Pediatrics, concerned about the effects of Alar on children, requested that the Agency suspend the use of the chemical. *See* CR 165, Ex. F, Olson Dep. Ex. 168 (Letter from Dr. Martin Smith to EPA (May 8, 1986)); CR 165, Ex. C, Wilkinson Dep. Ex. 72 (Letter from Dr. Richard Jackson to "fellow pediatricians" (May 2, 1986)). Meanwhile, major grocery chains joined Ralph Nader's boycott of apple products and the Washington Apple Commission advised growers to avoid Alar. CR 165, Ex. C, Wilkinson Dep. Ex. 57 (D. Lester, *Wash. Apple Commission Advises to Halt Use of Alar Until Proven Safe*, The Packer, July 19, 1986)).

[22] *Pepelko Memorandum*, at 2.

[23] Risk assessors, like the EPA, use mathematical expressions to state risk estimates, which are derived by combining potency figures with exposure data. For example, a cancer risk of 5×10^{-5} is mathematical shorthand for a risk estimated to cause cancer in 5 people out of 100,000. The EPA considers any risk higher than 1 out of one million (1×10^{-6}) to be an unacceptable risk. CR 165,

(1992). On February 1, 1989, the Agency announced it had found an "inescapable and direct correlation between exposure to UDMH and the development of life-threatening tumors in test mice." [24] The EPA Peer Review Committee met and reaffirmed its conclusion that both Alar and UDMH were probable human carcinogens.[25] As the EPA's Assistant Administrator Dr. Jack Moore told Congress, EPA's evidence "was suitable for a decision to say that indeed [Alar] was a carcinogen . . . ." *Food Safety*, at 24.

C. *The 60 MINUTES Broadcast*

On February 26, 1989, CBS broadcast the 60 MINUTES report entitled " 'A' is for Apple," [26] which addressed a range of topics, including the alleged failure of the EPA and the Food and Drug Administration to adequately regulate carcinogenic pesticides used on agricultural products, and the unreasonable amount of time the agencies may take to limit exposure from hazardous pesticides.[27] The broadcast noted that pesticides on fruit

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Ex. Y (*Food Safety Issues: Hearing Before the Subcomm. on Dept. Operations, Research, and Foreign Agriculture of the House Comm. on Agriculture*, 101st Cong., 1st Sess. 57 (1989)) ("*Food Safety*"); CR 165, Ex. L, Pendergrass Dep. Ex. 235 (National Research Council ("NRC"), *Pesticides in the Diets of Infants and Children* 129 (1993)) ("*Pesticides*").

[24] CR 165, Ex. C, Wilkinson Dep. Ex. 87 (EPA Press Release dated Feb. 1, 1989).

[25] EPA, *Second Peer Review*, at 12.

[26] A transcript of the 60 MINUTES broadcast is attached as an appendix to the District Court's decision in *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928, 938-41 (E.D. Wash. 1992) ("*Auvil I*"); *see also* Petition for Certiorari ("Pet.") at 45a-55a.

[27] FIFRA allows EPA to cancel registration of any pesticide that causes an "unreasonable risk to man." 7 U.S.C. § 136(bb); 136d(b). The Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601-29, requires EPA to take action upon receipt of information that indicates "that there may be a reasonable basis to conclude" that a chemical presents a significant risk of harm to humans from cancer. 15 U.S.C. § 2603(f).

posed a particular risk to children because children consume more fruit per unit of body weight than adults, yet in calculating dietary risk from agricultural pesticides EPA did not appropriately account for children's increased lifetime risk. The CBS broadcast discussed daminozide—along with its breakdown product and contaminant, UDMH—and benomyl, a chemical pesticide used on bananas.

The CBS broadcast included risk assessments about the increased incidence of possible cancer cases attributable to exposure to daminozide—predictions that were based upon EPA data and the NRDC's 1989 report entitled *Intolerable Risk: Pesticides in our Children's Food* (*"Intolerable Risk"*) (CR 165, Ex. B, Slovic Dep. Ex. 23), which studied 23 pesticides used in the nation's food supply. CBS also reported the opinion of some scientists that Alar was the "most potent" carcinogen in the nation's food supply. The broadcast commented that children were most at risk, because they consume more fruits and juices than adults.[28] It also quoted Uniroyal, which asserted that ". . . any risk from daminozide or UDMH, if it exists, is negligible." [29]

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[28] Dr. John Graef, a professor of pediatrics at Harvard, was interviewed during the broadcast and commented that he "quibbled" with some of the NRDC's calculations, but that "by and large, the basis of the [NRDC] report is sound . . . . [C]hildren clearly are subject to very large exposures to these chemicals . . . [and] are at greater risk than [are] adults." Dr. Moore, then assistant administrator of the EPA, also disagreed with NRDC's estimate of the magnitude of the risk. Yet he acknowledged that the EPA was not "debating whether or not there's a problem here. What we're debating is the pace by which one should get it off the market. We have concluded that it's a problem, [and] it should come off the market."

[29] In addition, Dr. Moore stated that EPA believed the "magnitude of the risk" was less than NRDC estimated and that the data were not "sufficiently provocative" to justify immediate cancellation of Alar's registration. Dr. Graef also disagreed with the NRDC's calculations.

D. *The Regulatory History of Alar Following the 60 MINUTES Report*

In May 1989, EPA again moved the Alar cancellation process forward by issuing a position document, PD 2/3, which reflected interim data from Uniroyal's animal studies. The Agency stated:

> Considered with the results of the earlier oncogenicity studies on daminozide and UDMH, which showed the same tumor types as the newer Uniroyal studies, the Agency has classified both daminozide and UDMH as Group B_2 chemicals, probably human carcinogens.

54 Fed. Reg. 22,558, 22,564 (1989). Agency scientists discussed the carcinogenicity studies evaluated in determining both daminozide and UDMH to be B_2 carcinogens:

> Several carcinogenicity studies serve as the historical basis of concern about the carcinogenic potential of daminozide and UDMH. These studies . . . suggested that daminozide is oncogenic in laboratory rats and mice, and UDMH is oncogenic in laboratory mice and hamsters.[30]

In October 1989, Uniroyal asked the EPA to withdraw Alar's food-use registrations. 57 Fed. Reg. 46,436, 46,436 (1992).

Finally, on October 8, 1992, EPA issued a final notice concluding that "the dietary risk posed to the general

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[30] CR 165, Ex. H, Farber Dep. Ex. 216 (EPA, *Daminozide Special Review Technical Support Document—Preliminary Determination to Cancel the Food Uses of Daminozide* II-1 (May 1989)) (*"Technical Support Doc."*); *Nader v. United States EPA*, 859 F.2d 747, 749 (9th Cir. 1988) ("[f]ive scientific studies conducted between 1973 and 1984 demonstrated with statistically significant results a correlation between ingestion of Alar and various types of tumors in certain lab animals"), *cert. denied*, 490 U.S. 1034 (1989). All these scientific studies are part of the District Court record. *See* CR 165, Ex. E, Rosen Dep. Exs. 137 (Toth, 1973), 138 (Toth, 1977a), 139 (Toth, 1977b); CR 165, Exs. N (NCI, 1978), DD (Haun, 1984).

population in 1989 was unreasonable" and adhered to its regulatory position on the food uses of daminozide. *Id.* at 46,438. Although Uniroyal disagreed with EPA's classification of daminozide, the Agency retained the B_2 classification. *Id.* at 46,440.

The Agency uses animal studies to generate a chemical's cancer potency factor (its so-called q^*),[31] which is combined with exposure data to determine cancer risk to humans. In 1992, three years after the CBS broadcast, EPA revised the UDMH cancer potency factor downward by a factor of two,[32] but it reaffirmed that the cancer risks to consumers posed by Alar were unreasonable and that the chemical should remain off the market.[33]

E. *A Comparison of NRDC and EPA Risk Assessments*

The NRDC's risk assessments in 1989 relied upon EPA's data, with some refinements. In *Intolerable Risk*, for example, NRDC calculated the lifetime carcinogenic risk from UDMH to be (24×10^{-5}) while EPA calculated the lifetime carcinogenic risk from UDMH to be (4.9×10^{-5}).[34] NRDC risk calculations were higher than EPA's calculations by about a factor of five for three reasons: (1) NRDC based its calculation on children's

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[31] "A high q^* indicates a strong oncogenic response (more tumors) to the administered dose; a low number indicates a weak response." CR 165, Ex. E, Rosen Dep. Ex. 177 (NRC, *Regulating Pesticides in Food: The Delaney Paradox* 54 (1987)) (*"Delaney Paradox"*). EPA periodically complies q^*'s for all pesticides. *See* CR 165, Ex. D, Whelan Dep. Ex. 111 (Reto Engler, EPA Memo "List of Chemicals Evaluated for Carcinogenic Potential" (Oct. 14, 1992)) (*"Engler Memo"*).

[32] CR 165, Ex. C, Wilkinson Dep. Ex. 78 (*Statement by the U.S. Environmental Protection Agency on Alar* (Feb. 25, 1992)).

[33] *Id.*; *see also id.* (letter from Deputy Assistant Administrator, Office of Pesticides and Toxic Substances, EPA, stating that the change in potency value, or "q^*," did not change EPA's conclusion that "dietary risks from historical exposures are unacceptably high").

[34] *Cf.* NRDC, *Intolerable Risk*, at 139, *with* EPA, *Technical Support Doc.*, at II-41.

intake of pesticides for the first five years of life,[35] while EPA based its calculation on the average intake of pesticides over a lifetime;[36] (2) NRDC took into account the latency period of cancer and thus gave increased weight to early exposure,[37] while EPA weighted exposure at any age equally;[38] and (3) NRDC used the UDMH cancer potency factor EPA had used until 1989 ($q^* = 8.9$ (mg./kg/day)$^{-1}$), while EPA used a new UDMH q^* based on interim studies by Uniroyal (0.88 (mg/kg/day)$^{-1}$).[39]

As the CBS broadcast made clear, however, "both EPA and NRDC want[ed] Alar off the market, though they differ[ed] on the urgency of the problem . . . ."[40] Furthermore, the EPA and NRDC risk estimates were "not that far apart. [Even a] factor of 25 difference is well within the range of what two reasonable people, using similar data and reasonable assumptions, might come up with."[41]

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[35] NRDC, *Intolerable Risk*, at 15. NRDC considered exposure during the first five years of life especially significant because, per unit body weight, young children ingest substantially more fruit than adults. *Id.* at 24. Four years later, the National Academy of Sciences ("NAS") confirmed the validity of this premise. *See* NRC, *Pesticides*, at 172, fig. 5-1. Particularly compelling is the NAS finding that one-year-old children consume more than 30 times more apple juice per day than adults. *Id.* at 351.

[36] EPA, *Technical Support Doc.*, at II-33.

[37] NRDC, *Intolerable Risk*, at 121. The validity of weighing early childhood exposure more heavily than adult exposure is also strongly supported by the NAS committee report. *See* NRC, *Pesticides*, at 354, table 8-2 (concluding that for foods that are more heavily consumed by children than adults, such as apple juice, a weighing factor as high as 3.74 is appropriate).

[38] EPA, *Technical Support Doc.*, at II-39-40.

[39] *Cf.* NRDC, *Intolerable Risk*, at 129, *with* EPA, *Technical Support Doc.*, at II-39.

[40] CR 165, Ex. F, Olson Dep. Ex. 170 (L. Roberts, *Alar: The Numbers Game*, 243 Science 1430, 1430 (1989)).

[41] *Id.*

F. *The Procedural History of the Lawsuit*

On November 28, 1990, eleven Washington apple growers filed a complaint in the Yakima County Superior Court of the State of Washington, claiming, *inter alia*, product disparagement and naming as defendants CBS, three CBS affiliates, the NRDC, and Fenton Communications, Inc. ("Fenton"), a public relations firm used by the NRDC in 1989.[42] The defendants removed the case to the United States District Court for the Eastern District of Washington on grounds of diversity of citizenship. CR 1. The CBS affiliate defendants were later dismissed. CR 104. Although the lawsuit was initially styled as a class action, petitioners never obtained certification of the purported class of 4,700 Washington apple growers. CR 51.

In January 1992, CBS moved to dismiss because the broadcast was not "of and concerning" any of the plaintiffs. CR 59-64, 100. The District Court refused to dismiss the claims against CBS,[43] but later dismissed the claims brought against NRDC and Fenton, holding that they had disparaged "at least the whole agricultural world." [44]

In July 1993, after extensive discovery on the allegations of falsity, including twelve expert witness depositions, CBS moved for summary judgment. CR 164-70, 180, 198. CBS argued that the plaintiffs had failed to prove "that the gist of the broadcast is demonstrably, verifiably false—not merely that they disagree with it, would have stated it differently, or wish that it had emphasized their particular point of view." CR 180 at 37.

CBS also argued that the plaintiffs had failed to meet their burden of proof even as to various individual state-

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[42] CR 1, Ex. A.

[43] The court allowed petitioners' product disparagement claims to proceed against CBS even though it held that, were this a defamation action, no single grower could satisfy the "of and concerning" requirement. *Auvil I*, 800 F. Supp. at 933.

[44] *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 941, 944 (E.D. Wash. 1992) (*"Auvil II"*).

ments in the broadcast.[45] CR 180 at 61-70. Thus, because the plaintiffs had offered no evidence that Alar was *not* one of the "most potent" carcinogens added to the nation's food supply, the NRDC's statement regarding Alar as the "most potent" carcinogen was substantially true and not actionable under Washington law. *Id.* at 65-67.

Meanwhile, the plaintiffs cross-moved for partial summary judgment on the issue of falsity. CR 171, 173-77, 181. They offered an affidavit from Dr. David Frank, a Ph.D. in human rhetoric and communication who claimed that he knew what the "message" of the CBS broadcast was. According to Dr. Frank:

> The Message of the 60 Minutes story "A is for Apple" is that "scientific evidence demonstrates conclusively that apples are an immediate hazard to public health because they will cause cancer in children."

CR 192 (Frank Aff.) at 7. The plaintiffs filed other affidavits opposing CBS' motion for summary judgment. CR 184-93, 196-98. They did not respond to CBS' defense of various statements in the broadcast, however, asserting that the court must focus on the alleged "message" of the broadcast as developed by Dr. Frank. CR 206 at 4-5, 14.

Next, claiming that the EPA's conclusions about Alar were wrong and that scientists cannot rely on the results of animal tests to determine human cancer risks, the plaintiffs moved to strike the opinions of the CBS scientific expert witnesses.[46] CR 172. CBS opposed that motion. CR 182.

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[45] Petitioners' statement to this Court that the Ninth Circuit affirmed the "grant of summary judgment on a ground never raised by CBS," Pet. at 23, is contradicted by the trial court record. *See* discussion, *infra*, at pages 21-25.

[46] The plaintiffs' motion to strike was based on this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993).

The District Court denied the plaintiffs' motion to strike, finding that "at least to the extent CBS' experts relied on the data and conclusions provided by the EPA, their conclusions are clearly sufficiently reliable for this inquiry."[47] The court also denied the plaintiffs' cross-motion for partial summary judgment.[48]

In analyzing CBS' summary judgment motion, the court divided the broadcast into three component statements: (1) daminozide is the most potent cancer-causing agent in the food supply; (2) daminozide poses an imminent hazard and an unacceptable risk; and (3) daminozide is most harmful to children. *Auvil III*, 836 F. Supp. at 742. Faced with the overwhelming EPA evidence of cancer risk and the failure to offer any evidence of Alar's safety by petitioners and their experts,[49] the District Court concluded that none of the statements "can be proven as false." *Auvil III*, 836 F. Supp. at 742. Accordingly, the court entered summary judgment in favor of CBS. *Id.* at 741-43.

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit.[50] On October 2, 1995, the court affirmed the District Court's judgment.[51] In its opinion, the Ninth Circuit noted that the CBS broadcast had included "a number of viewpoints on the Alar issue"

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[47] *Auvil v. CBS "60 Minutes"*, 836 F. Supp. 740, 741 (E.D. Wash. 1993) (*"Auvil III"*).

[48] *Id.* at 741.

[49] When asked for proof of Alar's alleged safety, petitioners' experts conceded that they could not prove this. *E.g.*, CR 165, Ex. F (Olson Dep. Tr. at 226-28), Ex. C (Wilkinson Dep. Tr. at 284), Ex. D (Whelan Dep. Tr. at 121).

[50] On appeal, petitioners did not challenge the District Court's denial of their motion to strike and dropped any arguments based on *Daubert*. *See* Appellants' Brief (no citation to *Daubert*); Appellants' Reply Brief (same); Appellants' Petition for Rehearing (same).

[51] *Auvil v. CBS "60 Minutes"*, 67 F.3d 816 (9th Cir. 1995).

and held that petitioners' argument, which consisted of a claim that "no studies have been conducted to test the relationship between ingestion of daminozide and incidence of cancer in *humans*" and a "claim that animal studies cannot be relied on to indicate cancer risk for humans," was "insufficient to show a genuine issue for trial regarding the broadcast's assertions that daminozide is a potent carcinogen," given that EPA's "[a]nimal laboratory tests are a legitimate means for assessing cancer risks to humans." [52]

The Court of Appeals also held that because they had not presented any evidence that contradicted the NRDC's findings that children "ingest more apple products per unit of body weight than do adults," petitioners had failed to "create a genuine issue as to the falsity of the broadcast's assertion that daminozide is more harmful to children." [53] Finally, the court concluded that petitioners' "attempt to derive a specific, implied message from the broadcast as a whole and to prove the falsity of that overall *message* is unprecedented and inconsistent with Washington law." [54] The court denied the petition for rehearing on October 27, 1995.[55] Pet. at 17a-18a.

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[52] 67 F.3d at 818, 821 (emphasis in original).

[53] *Id.* at 821-22.

[54] *Id.* at 822 (emphasis in original). Because of its ruling on the falsity issue, the court did not consider another ground argued by CBS for affirmance—the fact that petitioners' claims did not satisfy the "of and concerning" requirements of the First Amendment and Washington State law. *Id.* at 819 n.4; *see* Brief of Appellee CBS Inc. at 14-22. The "of and concerning" rule provides an independent basis for affirming the judgment below. *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

[55] Justice Sandra Day O'Connor granted petitioners' application to extend the deadline for filing their petition for certiorari up to and including February 26, 1996.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 10.1 states that "a petition for a writ of certiorari will be granted only where there are special and important reasons therefor." Petitioners suggest, variously, that the decision below is inconsistent with decisions from other circuits or with those of this Court, that the Ninth Circuit "badly fumbled" the case, and that the Court should provide "guidance" for other lawsuits. *See* Pet. at 13-30. None of these assertions, however, is supported by the record or justifies a grant of certiorari under Rule 10.1. The Court should deny the Petition.

I. BECAUSE PETITIONERS DID NOT PRESS THEIR OBJECTION TO CBS' SCIENTIFIC EVIDENCE IN THE COURT OF APPEALS AND THAT COURT NEVER PASSED UPON THAT ISSUE, THIS IS NOT AN APPROPRIATE CASE FOR CLARIFYING *DAUBERT v. MERRELL DOW PHARMACEUTICALS*

Petitioners urge this Court to accept review of this case to correct the Ninth Circuit's "badly fumbled" efforts to deal with "issues of causation in the scientific context" because the decision is "directly at odds" with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), which articulated standards for "judicial evaluation of scientific methodology." Pet. at 13. They assert that the Ninth Circuit arrogated to itself the "role of arbiter of scientific questions" in ruling that the animal test data offered by CBS constituted valid evidence of carcinogenicity because it was a "legitimate means for assessing cancer risks to humans." *Id.* at 16. Petitioners' revived interest in this issue is surprising, given their failure to pursue it in the Ninth Circuit.

In July 1993, petitioners moved in the District Court to strike the opinions of CBS' scientific experts, who had offered human cancer risk assessments of Alar based upon their review and analysis of the EPA's evidence that Alar is a "probable human carcinogen," as well as their review of animal bioassay data. In moving to strike, petitioners

relied squarely on *Daubert* and argued that these expert opinions were inadmissible because, *inter alia*, they were "not peer-reviewed," and "reflect[ed] no methodology for quantitative assessment of actual risk, generally accepted by experts in the relevant fields of medicine, toxicology and biostatistics." CR 172 at 2. (Notably, petitioners did not move to strike any of the underlying EPA data, which were admitted without objection.)

In refusing to strike this evidence, the District Court understood *Daubert* as rejecting the then-prevailing judicial view that "expert opinion is only admissible if it is based on a technique or methodology that is generally acceptable by the scientific community." *Auvil III*, 836 F. Supp. at 741. The court noted that the "thrust" of *Daubert* was to "move away" from the focus of "general acceptance, as gauged by publication and the decisions of other courts" and to focus on whether an "expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* Accordingly, having concluded that "[a]nimal laboratory tests are a legitimate means for assessing cancer risk to humans," [56] the District Court found CBS' evidence to be relevant, and, "at least to the extent CBS' experts relied on the data and conclusions provided by EPA," reliable. *Auvil III*, 836 F. Supp. at 741.

Although petitioners now urge this Court to "provide guidance to the lower federal courts on complex scientific causation issues," their passion for this question [57] was

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[56] There is no epidemiological data on Alar. CR 193 (Olson Aff.) at 12. Thus, petitioners misrepresent the record when they state that the Ninth Circuit ignored evidence that "all epidemiological studies have shown an absence of any link between Alar/UDMH and cancer in humans." *See* Pet. at 15; *see also* discussion, *infra*, at page 20, n.67.

[57] Petitioners cite a recent study by a panel of the NAS, which discussed the risks from natural and synthetic chemicals in our food supply. Pet. at 18. It has long been settled that matters that are outside the record will not be considered by the Court. *E.g., Schley v. Pullman's Palace Car Co.*, 120 U.S. 575 (1887).

noticeably absent from their Ninth Circuit submissions. In their Ninth Circuit appeal, petitioners did not pursue the argument that this evidence should have been excluded, and indeed did not even cite *Daubert*.[58] Given the total absence of any argument on this point, the Ninth Circuit did not discuss *Daubert* or explicitly engage in any *Daubert*-type analysis. For this reason alone, this is not an appropriate case for clarifying or defining the scope of *Daubert*.[59]

Alternatively, even if the Ninth Circuit actually had ruled on this issue, there is no reason for this Court to revisit *Daubert*. The "only challenge" to the admissibility of CBS' scientific evidence was petitioners' "claim that animal studies cannot be relied upon to indicate cancer risk for humans." 67 F.3d at 821. But, as the Ninth Circuit concluded, "[a]nimal laboratory tests are a legitimate means for assessing cancer risk to humans," *id.*, a conclusion which does not "so far depart from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision" and certainly does not create any conflict in the circuits. *See* S. Ct. R. 10.1(a), (c). Despite petitioners' repeated criticism of reliance on the results of animal bioassay data to predict human cancer risk (*see, e.g.*, Pet. at 16-19),

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[58] *See* Appellants' Brief (no citation to *Daubert*); Appellants' Reply Brief (same); Appellants' Petition for Rehearing (same).

[59] *See, e.g., Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991) (holding that the Court will not review an issue that was neither pressed nor passed upon by the court below); *see also* S. Ct. R. 10.1(c) (considerations that govern review on writ of certiorari include when a "United States court of appeals has *decided* an important question of federal law . . . or has *decided* a federal question in a way that conflicts with applicable decisions of this court") (emphasis added); *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) (refusing to entertain argument omitted from appellants' brief because the "'premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them'") (*quoting Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)).

the District Court's and the Ninth Circuit's decisions were on solid ground under *Daubert*,[60] given that the record established that such data are regularly accepted as valid predictors of human health risk by federal statutory law,[61] the EPA,[62] the World Health Organization's International Agency for Research on Cancer ("IARC"),[63] the NAS,[64]

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[60] The District Court's decision on admissibility of evidence is reviewable for abuse of discretion. *See, e.g., United States v. Abel*, 469 U.S. 45, 54 (1984).

[61] *See, e.g.*, Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 348(c)(3)(A) ("no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal"); TSCA, 15 U.S.C. §§ 2601-29, especially § 2603(b)(2)(A) (in prescribing "standards for the development of test data. . . . [t]he methodologies that may be prescribed . . . include epidemiologic studies, serial or hierarchical tests, in vitro tests, and whole animal tests").

[62] *See* 40 C.F.R. § 154.7(a)(2)(i) (EPA action may be based on "[e]ffects demonstrated in humans or experimental animals"); Final Guidelines for Developmental Toxicity Risk Assessment, 56 Fed. Reg. 63,798, 63,799 (1991) ("[h]azard identification/dose-response evaluation involves examining all available experimental animal and human data").

[63] IARC has determined that the daminozide tests that petitioners criticize are "sufficient evidence of carcinogenicity" in animals. *See* CR 165, Ex. G, Hoel Dep. Ex. 199 (IARC, *IARC Monographs on the Evaluation of Carcinogenic Risks to Humans* at 30, 44, 62 (7th Supp. 1987)) ("*Monographs*"). According to petitioners' expert Dr. Olson, the *Monographs* are an "authoritative source of information on the carcinogenicity of chemicals." CR 193 (Olson Aff.) at 10. As IARC has stated, "[i]n the absence of adequate data on humans, it is biologically plausible and prudent to regard agents for which there is sufficient evidence of carcinogenicity in experimental animals as if they presented a carcinogenic risk to humans." IARC, *Monographs*, at 30.

[64] Long-term animal bioassays are "commonly used as a basis for making qualitative inferences about the likelihood that an agent poses a carcinogenic hazard for humans." NRC, *Issues in Risk Assessment*, 15 (1993) ("*Issues*"); *id.* at 33 ("assumptions about relationships between animal and human data have proved fairly reliable"); *id.* at 44 ("For the few chemicals on which data exist, potency estimates calculated from animal data have been reported to be highly correlated with similar estimates made from

scientific publications,[65] and American scientists.[66] Using animal data to predict human cancers, moreover, is prac-

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human data . . . ."); *see also* CR 165, Ex. Q (NRC, *Risk Assessment in the Federal Government: Managing the Process* (1983)).

[65] *See, e.g.*, B. Sedgwick, *Oxidation of Methylhydrazines to Mutagenic Methylating Derivatives and Inducers of the Adaptive Response of E. coli to Alkylation Damage*, 52 Cancer Res. 3693, 3693 (1992) (UDMH "known to be carcinogenic in rodents"); CR 165, Ex. G, Hoel Dep. Ex. 203 (E. Crouch & R. Wilson, *Interspecies Comparison of Carcinogenic Potency*, 5 J. Toxicology & Envtl. Health 1095 (1979)); CR 165, Ex. G, Hoel Dep. Ex. 204 (H. Guess et al., *Uncertainty Estimates for Low-Dose-Rate Extrapolations of Animal Carcinogenicity Data*, 37 Cancer Res. 3475 (1977)); L. Tollefson et al., *Comparison of the Cancer Risk of Methylene Chloride Predicted from Animal Bioassay Data with the Epidemiologic Evid.*, 10 Risk Analysis 429, 429 (1990) (negative epidemiological data on methylene chloride insufficient "to show that the risk is inconsistent with the human risk estimated by modeling the rodent bioassay data").

[66] *See, e.g., New York Response, supra;* CR 165, Ex. X (*Health Effects of Pesticide Use On Children: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor & Human Resources*, 101st Cong., 1st Sess. 32 (1989)) (statement of Dr. Prothrow-Stith, Mass. Dept. of Public Health) ("sufficient scientific evidence" exists to support the "efficacy" of the UDMH animal studies and "[s]ome of the criticized protocol are in fact generally accepted procedures in the scientific community"); CR 165, Ex. G, Hoel Dep. Ex. 202 (L.S. Gold et al., *Rodent Carcinogens: Setting Priorities*, 258 Science 261 (1992)) ("*Rodent Carcinogens*") (relying on rodent data to predict risk to humans); CR 165, Ex. E, Rosen Dep. Ex. 181 (F. Perera & P. Boffetta, *Perspectives on Comparing Risks of Environmental Carcinogens*, 80 J. Nat'l Cancer Inst. 1282, 1283 (1988)) ("in a number of cases, risks observed in humans have been consistent with those calculated from high-dose animal experiments"); CR 165, Ex. C, Wilkinson Dep. Ex. 51 at 69 (both epidemiological data and animal data are used to evaluate human risks); CR 187, Jonsson Aff., Ex. 14 at 3, 4 (Drs. Lijinsky and Ames state, respectively, that there is "no question that Alar either is a carcinogen or it produces a carcinogen," UDMH, and that daminozide/UDMH "is clearly coming out as a carcinogen"). As the American Chemical Society has noted, animal studies are "the best predictors we have." CR 165, Ex. B, Slovic Dep. Ex. 31 at 229; *see also* Chemical Carcinogens: Review of the Science and Its Associated Prin-

tically necessary and ethically correct.[67] Federal courts have regularly accepted such data.[68]

At bottom, petitioners ask this Court to review a highly fact-specific evidentiary ruling on the role of animal bioassay data in human cancer risk assessment.[69] For

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ciples, 50 Fed. Reg. 10,372 (1985) (Office of Science and Technology Policy, Exec. Office of the President, adopting IARC position on propriety of relying on animal data).

[67] On a practical level, epidemiological methods are insensitive carcinogen detectors and have "great difficulty in demonstrating causality." NRC, *Issues*, at 47; *cf.* CR 165, Ex. C (Wilkinson Dep. Tr. at 72) ("the chronic health effects of chemicals cannot be verified by direct experimentation"). "Epidemiological studies are inherently capable of detecting only comparatively large increases in the relative risk . . . . Negative results cannot prove the absence of [risk] . . . ." EPA Final Guidelines for Carcinogen Risk Assessment, 51 Fed. Reg. 33,992, 33,995-96 (1986). On an ethical level, ignoring animal studies subjects human populations to avoidable risks of potentially catastrophic magnitude. *See Richardson v. Richardson-Merrell, Inc.*, 649 F. Supp. 799, 801 n.4 (D.D.C. 1986) (testing on humans could not lawfully or ethically be conducted), *aff'd*, 857 F.2d 823 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 882 (1989); CR 165, Ex. B (Slovic Dep. Tr. at 170-71) ("not acceptable" to "treat people as guinea pigs for studying chemical risks").

[68] *See, e.g., Environmental Def. Fund, Inc.* v. *EPA*, 548 F.2d 998, 1006 (D.C. Cir. 1976) (approving EPA's decision to "accept the use of animal test data to evaluate human cancer risks [and] consider a positive oncogenic effect in test animals as sufficient to characterize a pesticide as posing a cancer risk to man"), *cert. denied*, 431 U.S. 925 (1977); *Int'l Fabricare Inst. v. United States EPA*, 972 F.2d 384, 390 (D.C. Cir. 1992) (rejecting objections to EPA's risk assessment as "the opinions of a few scientists . . . at odds with what is 'generally thought' about the subject"); *Villari v. Terminix Intern., Inc.*, 692 F. Supp. 568, 570 (E.D. Pa. 1988) ("animal studies are routinely relied upon by the scientific community in assessing the carcinogenic effects of chemicals on humans").

[69] This was not a case about the use of scientific data to "determine whether particular chemicals are the cause of various injuries." Pet. at 20. This lawsuit concerned risk assessment—the "process by which scientific data are analyzed to describe the form, dimension, and characteristics of risk—that is, the likelihood of

the reasons discussed above, the Ninth Circuit's holding that animal test data are an accurate predictor of human cancer risk is a wholly unremarkable conclusion that fully comports with all relevant statutory and regulatory regimes and with the views of other courts.[70]

II. THE NINTH CIRCUIT DID NOT COMMIT ANY PROCEDURAL ERROR BY AFFIRMING SUMMARY JUDGMENT ON A GROUND THAT WAS SUPPORTED IN THE RECORD AND HAD BEEN ARGUED BY CBS, BUT ON WHICH PETITIONERS APPARENTLY HAD NOT FOCUSED THEIR ATTENTION

Petitioners assert that this case implicates an issue that has divided the circuits—*i.e.*, "what is the initial burden of production imposed by Rule 56 on a party moving for summary judgment." Pet. at 22. Although couched

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harm to humans or the environment." CR 165, Ex. FF (D. Patton, *The ABCs of Risk Assessment*, 19 E.P.A. J. 10, 11 (1993)). As a predictive science that is based on a "likelihood of harm" analysis, risk assessment does not determine whether any particular chemicals "are the cause of" any particular injuries because, as petitioners' expert Dr. Slovic conceded, "the notion of uncertainty is inherent in risk. If there's no uncertainty, there's no risk." CR 165, Ex. B (Slovic Dep. Tr. at 48). Thus, the debate over Alar's risks was a "political dispute." M. Curtis, *Monkey Trials: Science, Defamation, and the Supression of Dissent*, 4 Wm. & Mary Bill of Rights J. 507, 588 n.411 (1995).

[70] Nor did the District Court improperly weigh the evidence. Though they bore the burden of proof, petitioners devoted themselves to shadowboxing with an irrelevancy—the falsity of Dr. Frank's version of the broadcast's "message." *See, e.g.*, CR 191 (Wilkinson Aff.) at 6 ("My testimony discusses the falsity of that message."); CR 193 (Olson Aff.) at 7-8 (opinion also premised on Dr. Frank's "message"). The decision thus reflects the basic rule that "disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)); *see also Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (summary judgment "opponent must do more than simply show there is some metaphysical doubt as to the material facts").

as a broad attack on the manner in which federal courts have applied Rule 56 of the Federal Rules of Civil Procedure and this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), petitioners' argument is really that the Ninth Circuit erred because it allegedly affirmed CBS' summary judgment "on a ground never raised by CBS." [71] The court's decision, however, involved no such error—and the suggestion of a due process violation is without support.

In July 1993, at the District Court's direction, the parties simultaneously filed motions for summary judgment. In its motion, CBS principally argued that the (1) central message of the 60 MINUTES report was not verifiably false; and (2) even if it were objectively verifiable, the message was not false. CR 180 at 35, 53. CBS also argued that individual components of the message—including the NRDC statement about Alar's potency—were either substantially true or were not verifiably false. *Id.* at 65-69. When petitioners moved for partial summary judgment, they asserted that the overall message was false and they disputed CBS' characterization of that message.[72]

In reply, CBS asserted that individual statements in the broadcast were substantially true. CR 198 at 30-36. In accordance with the requirements articulated by this Court in the *Celotex* case,[73] CBS also identified those portions

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[71] Pet. at 23. Of course, under well-established case law, the Court of Appeals could affirm the grant of summary judgment on any basis that appeared in the record. *E.g., Mitchell v. Collagen Corp.*, 67 F.3d 1268, 1285 (7th Cir. 1995); *Jones v. Unisys Corp.*, 54 F.3d 624, 627-28 (10th Cir. 1995); *McKenzie v. General Tel. Co. of California*, 41 F.3d 1310, 1316 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1697 (1995).

[72] *See* CR 171-77. These motions were filed after extensive discovery on the issue of falsity, which included document discovery and depositions of twelve scientific experts, including experts in the field of risk assessment, toxicology, biostatistics, and pediatric medicine. *See* CR 180 at 9-11.

[73] In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), this Court articulated the burden of production that rests on a party seeking

of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," Fed. R. Civ. P. 56(c), that demonstrated the absence of a genuine issue of material fact on the issue of falsity. For example, CBS submitted its First Amended Answers to Plaintiffs' Fourth Interrogatories, which provided extensive documentary support for each of the allegedly false statements. *See* CR 166 (Pesce Aff.) Ex. A; CR 198 at 30. In demonstrating the substantial truth of the statement that Alar was the "most potent" cancer-causing agent in the food supply, CBS referred petitioners to the EPA memoranda and reports, testimony before various Congressional committees, and bioassay data that supported that statement. CR 166 (Pesce Aff.) Ex. A at 5-46.

When petitioners filed their sur-reply to CBS' summary judgment motion, they acknowledged that CBS had devoted "10 pages" in its reply brief discussing the truth of "isolated" statements in the broadcast, but they apparently believed that CBS' approach was misguided and predicated their entire case on their theory that the District Court's "falsity" analysis must be on their version of the overall "message" of the broadcast. CR 206 at 4-5, 14.[74] As a result, petitioners devoted very little, if any, discussion in the District Court to the alleged falsity of individual statements in the broadcast.

On appeal, petitioners again focused on the claimed falsity of their own rendering of an alleged message con-

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summary judgment under Fed. R. Civ. P. 56. As the Court explained, "[a] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any,' which it believes demonstrate the absence of a genuine issue of material fact." 477 U.S. at 323.

[74] As a result, petitioners' submissions in the District Court failed to respond to the documentary evidence adduced by CBS on the issue of the substantial truth of individual statements in the broadcast.

veyed by the 60 MINUTES broadcast. Indeed, their statement of the issue presented for the Ninth Circuit's review was framed as:

> Could a reasonable jury accept Plaintiffs' interpretation of CBS' broadcast message and find that Plaintiffs met their burden of proving that message false?

Appellants' Brief at 2.[75] Petitioners now readily concede that they "devoted a major portion of their argument to attempting to demonstrate what the overall message of the broadcast was." Pet. at 24.

Although the Ninth Circuit ultimately rejected petitioners' efforts to defeat summary judgment by relying on an implied, overall false "message"—stating that the inquiry must be whether or not individual statements in the 60 MINUTES broadcast were false[76]—this case is not akin to *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 800 F.2d 1208 (1986). In *McBride*, the trial court granted summary judgment *sua sponte* on a ground not raised by the moving party.[77] Here, of course, petitioners

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[75] CBS argued in opposition to the appeal that individual statements were substantially true. Brief of Appellee CBS Inc. at 32-35. Petitioners' reply in the Ninth Circuit, however, was limited to an exegesis of the "false" message extracted by Dr. Frank. Appellants' Reply Brief at 11-20.

[76] The Ninth Circuit explained that a contrary approach would "raise[] the spectre of a chilling effect."

> Because a broadcast could be interpreted in numerous, nuanced ways, a great deal of uncertainty would arise as to the message conveyed by the broadcast. Such uncertainty would make it difficult for broadcasters to predict whether their work would subject them to tort liability.

67 F.3d at 822.

[77] In reversing that order, the court held that

> [Plaintiff] McBride was not on notice that he was obliged to marshall all evidence to establish a triable issue over the defendants' actual malice or face summary judgment. Having been afforded no opportunity for discovery into the . . . defendants' state of mind [*i.e.*, actual malice] McBride could

were fully on notice that CBS was relying on the argument that individual statements in the broadcast were substantially true. They simply chose not to respond to that issue either in the District Court or in the Ninth Circuit, devoting their resources to tilting at Dr. Frank's windmill. They cannot ask this Court to grant certiorari to remedy that self-created problem.

III. THE DECISION BELOW DID NOT DECIDE ANY FIRST AMENDMENT QUESTION RELATING TO "LITERALLY TRUE STATEMENTS WITH DEFAMATORY IMPLICATIONS" AND, MOREOVER, WAS A STATE LAW RULING THAT DOES NOT CONFLICT WITH ANY FEDERAL APPELLATE DECISION

Petitioners ask the Court to grant review to resolve an "important First Amendment issue" that they claim has divided the various federal appeals courts—"whether the First Amendment protects speakers from liability for statements which, although literally true, have false and defamatory implications." Pet. at 26. This question, however, was neither pressed by the parties nor passed upon by the courts below. Petitioners, moreover, are challenging a decision grounded entirely on state law.

First, the premise that underlies petitioners' argument is simply wrong: CBS never argued—and did not need to argue—that every statement in the broadcast was "literally true." Pet. at 26. Rather, CBS asserted that the individual statements were not actionable because they were substantially true. CR 180 at 35-37; Brief of Appellee CBS Inc. at 32-35.

More importantly, this "substantial truth" argument was based on applicable state law.[78] For example, peti-

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hardly have anticipated that the time had come to put up or shut up with evidence of defendants' actual malice.

800 F.2d at 1212.

[78] As CBS noted: "A statement that is substantially true—even if technically in error—cannot support liability for defamation

tioners attacked the NRDC statement calling Alar the "most potent cancer-causing chemical in our food supply" and claimed that at least one naturally-occurring chemical (aflatoxin) might have a higher toxicological potency number than UDMH,[79] but CBS showed that, even if UDMH was not, technically, the "most potent" carcinogen in existence, it made Alar one of the "most potent" carcinogens added to the food supply.[80] Under Wash-

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under Washington law." Brief of Appellee CBS Inc. at 32. Under Washington law, a defamation plaintiff cannot prevail merely by pointing to minor inaccuracies in a broadcast that do not alter the "gist or substance of the report when considered as a whole." *Herron v. KING Broadcasting Co.*, 112 Wash. 2d 762, 769, 776 P.2d 98, 102 (1989); *see also Mark v. Seattle Times Co.*, 96 Wash. 2d 473, 493, 635 P.2d 1081, 1092 (1981) (defamation law demands an inquiry into substantial truth), *cert. denied*, 457 U.S. 1124 (1982). As the Washington Supreme Court explained in *Herron*, an allegedly false statement "affects the 'sting' of a report only when 'significantly greater opprobrum' results." 112 Wash. 2d at 769, 776 P.2d at 102.

[79] The District Court (in a ruling that petitioners did not challenge on appeal) held that this statement was not actionable because it "was directed to EPA inaction, not apples." *Auvil II*, 800 F. Supp. at 944. In addition, whether aflatoxin is more potent than UDMH is debatable. *See, e.g.*, CR 165, Ex. I, Finkel Dep. Ex. 219 (A. Finkel, *Towards Less Overconfident Comparisons of Uncertain Risks: The Case of Aflatoxin and Alar* (May 1993 Draft)).

[80] EPA's potency, or q^* value, for UDMH changed over time. In 1989 EPA revised the q^* down to 8.8×10^{-1} (or 0.88). In 1991 EPA revised it to 4.6×10^{-1} (or 0.46). *See* Attachment to *Engler Memo, supra*, at 7. Using similar data, California officials have concluded that the q^* for UDMH was 2.8, which was even higher than EPA's calculation. *See* CR 165, Ex. G, Hoel Dep. Ex. 210 (Cal. Env. Prot. Agency, *Risk-Specific Intake Level for Proposition 65 Carcinogen 1,1-Dimetheylhydrazine (UDMH)* (1992). Using California's q^* UDMH would be more potent than any other pesticide. *See* NRC, *Delaney Paradox*, at 55. As recently as 1992, Dr. Bruce Ames, relied upon by petitioners' experts, ranked EDB, DDT, DDE, and UDMH as the four most potent synthetic pesticides. *See* L.S. Gold et al., *Rodent Carcinogens*, 258 Science at 262-64. Of those, only UDMH was on the market in 1989. *Id.* at 264, table 3;

ington's *Mark* rule, this statement was not actionable.[81]

Because it was never raised in, or decided by, the courts below, petitioners' First Amendment question is not presented by this case.[82] CBS relied on state substantive law, not on the First Amendment, when it argued that the broadcast itself—not Dr. Frank's attempt to torture a latent, false "message" from the broadcast—was the best (and indeed only) evidence of what the broadcast actually said.[83] Also, the Ninth Circuit relied on Washington law in holding that liability may not be based on the hidden "message" divined by Dr. Frank and that petitioners' claims must rise or fall on "the statements themselves," rather than on some "implied, disparaging

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see also 37 Fed. Reg. 13,369 (1972) (cancellation of DDT and DDE); 48 Fed. Reg. 46,234 (1983) (cancellation of EDB).

[81] *See Mark*, 96 Wash. 2d at 496, 635 P.2d at 1093; *Auvil III*, 836 F. Supp. at 742 (noting undisputed evidence that "UDMH ranked as one of the most if not the most carcinogenic synthetic pesticide then on the market").

[82] *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("ordinarily, this Court does not decide questions not raised or involved in the lower court"); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (question presented in petition but "not raised in Court of Appeals . . . is not properly before us").

[83] *See, e.g.*, CR 198 at 12 n.23 (" 'The defamatory meaning must be certain and apparent' from the broadcast itself and '[a] court is bound to invest words with their natural and obvious meaning, and may not extend language by innuendo or by the conclusions of the pleader.' ") (*quoting Sims v. KIRO, Inc.*, 20 Wash. App. 229, 234, 580 P.2d 642, 645, *rev. denied*, 91 Wash. 2d 1007 (1978), *cert. denied*, 441 U.S. 945 (1979)); CR 198 at 14 ("Ambiguities are not to be resolved in favor of a defamatory or disparaging meaning.") (*citing Lee v. The Columbian, Inc.*, 64 Wash. App. 534, 538, 826 P.2d 217, 220 (1991); *Exner v. American Medical Ass'n*, 12 Wash. App. 215, 217-18, 529 P.2d 863, 866 (1974)). CBS held to that position on appeal, relying on Washington State substantive law, not on the First Amendment. *See* Brief of Appellee CBS Inc. at 24-25.

message." [84] Petitioners have not identified any part of the Ninth Circuit's opinion—which is otherwise based completely on Washington law and general tort policy grounds—which suggests that the decision turns upon an interpretation of the First Amendment.[85] Its state law ruling is not appropriate for review by this Court.[86]

None of the cases cited by petitioners (Pet. at 28-29) suggests a conflict over any question of federal law. *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990), applied "District of Columbia defamation law" and the court's "understanding of the law of defamation by implication," not the First Amendment. *Id.* at 518-19.[87] Similarly, in *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993), the court cited Virginia law

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[84] 67 F.3d at 822 (*citing Lee*, 64 Wash. App. at 538, 826 P.2d at 220). *Lee* in turn relied on *Sims*, 20 Wash. App. at 234, 580 P.2d at 645.

[85] Petitioners try to cure this problem by adding two critical words ("First Amendment") that were not used by the court below. "The court held that a contrary rule would 'raise[] the spectre of a chilling effect' (App. 15a) on *First Amendment speech rights*. . . ." Pet. at 26-27 (emphasis added). The Ninth Circuit said merely that such "uncertainty raises the spectre of a chilling effect on speech." 67 F.3d at 822.

[86] Petitioners, of course, disagree with this state law holding. *See* Pet. at 27 n.18. Citing earlier cases such as *Taskett v. KING Broadcasting Co.*, 86 Wash. 2d 439, 445, 546 P.2d 81, 85 (1976), they contend that prior "Washington Supreme Court case law makes clear that Washington *does* permit libel plaintiffs to recover for false implications arising from literally-true statements." Pet. at 27 n.18 (emphasis in original). In fact, as the *Lee* court ruled, *Taskett* does not stand for that proposition. *See Lee*, 64 Wash. App. at 538 n.3, 826 P.2d at 220 n.3. More to the point, this issue of state law, whether or not rightly decided by *Lee* and *Sims*, is not a matter for resolution by this Court. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1963).

[87] Indeed, the *White* decision, which dealt simply with whether "a challenged statement" or "a statement," *id.* at 518, is capable of defamatory meaning, did not consider whether to permit a cause of action based upon an implied "overall message" that might be false and defamatory.

for the proposition that "[a] defamatory implication must be present in the plain and natural meaning of the words used." *Id.* at 1092 (*citing Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 82 S.E.2d 588, 591-92 (1954)).[88] *Janklow v. Newsweek, Inc.*, 759 F.2d 644 (8th Cir. 1985), *reheard on other grounds*, 788 F.2d 1300 (8th Cir.) (*en banc*), *cert. denied*, 479 U.S. 883 (1986), relied on South Dakota law when it stated that "the law does not recognize libel by omission as a tort," adding that its rejection of libel-by-omission was "grounded on our reading of the definition of libel." *Id.* at 648.[89] Petitioners' suggestion of a conflict with *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), is also unsupported by the record.[90]

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[88] The court's view of Virginia law, moreover, did not differ from the Ninth Circuit's application of Washington law:

> The falsity of a statement and the defamatory "sting" of the publication must coincide—that is, where the alleged defamatory "sting" arises from substantially true facts, the plaintiff may not rely on minor or irrelevant inaccuracies to state a claim for libel.

Chapin, 993 F.2d at 1092 (*citing AIDS Counseling and Testing Centers v. Group W Television, Inc.*, 903 F.2d 1000, 1004 (4th Cir. 1990)). To the extent the *Chapin* decision touched upon First Amendment issues at all, its analysis was not inconsistent with the result in this case. *See Chapin*, 993 F.2d at 1092 n.6 (" 'Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.' ") (*quoting Garrison v. Louisiana*, 379 U.S. 64, 74 (1965)).

[89] Although the Eighth Circuit also recognized that its conclusion "has strong underpinnings in the First Amendment," its decision in no way conflicts with the result in the Ninth Circuit, which also found libel by implication claims not actionable. *Id.* Indeed, the *Janklow* court agreed with the court below when it ruled that there is no basis for liability where a publication is not susceptible to the meaning that the plaintiff seeks to attach to it. *Id.* at 649.

[90] In *Milkovich*, the Court held that the First Amendment did not create a "wholesale defamation exemption for anything that might be labeled 'opinion.' " *Id.* at 18. *Milkovich* involved implications arising from specified "statements" by the defendant that

CONCLUSION

For the foregoing reasons, CBS respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

BRUCE E. H. JOHNSON *
P. CAMERON DEVORE
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101
(206) 628-7683

SUSANNA M. LOWY
ANTHONY M. BONGIORNO
CBS Inc.
51 West 52nd Street
New York, New York 10019
(212) 975-8758
Counsel for Respondents

Dated: March 28, 1996

* Counsel of Record

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were apparently actionable under Ohio law and did not address the situation presented here—*i.e.*, allegations of an implied "overall message" where the "statements" themselves are substantially true and where applicable state law rejects implied libel theories. Finally, *Milkovich* stated that, in these circumstances, "a statement on matters of public concern must be provable as false before there can be liability" under state law. *Id.* at 20 (*citing Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)). The decision below is completely consistent with that rule. *See, e.g., Auvil III*, 836 F. Supp. at 742-43 (applying *Hepps* holding).

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No. 95-1372

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GRADY and LILLIE AUVIL, ROBERT and CHARLOTTE BRODY, BURT and ELLY CHESTNUT, BERT and EVELYN STENNES d/b/a Squaw Creek Ranch, Inc., and all other Washington red apple growers similarly situated,

Petitioners,

v.

CBS "60 MINUTES", a foreign corporation, and COLUMBIA BROADCASTING SYSTEM (CBS), a foreign corporation, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Counsel for Petitioners

Date: April 9, 1996

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REPLY BRIEF OF PETITIONERS

The Petition and the opposition brief make three propositions plain. First, there is no dispute about the national significance of this case. Respondent CBS, Inc. ("CBS") does not take issue with Petitioners' assertions that the federal courts are increasingly being asked to address questions of scientific causation. Nor do they dispute that the causation-related controversy at issue in this case -- whether Alar is the "most potent cancer-causing agent in our food supply" -- has been far and away the most highly visible such controversy in this country in recent years.

Second, there is no dispute that Petitioners introduced in the district court a substantial body of evidence that challenged the accuracy of information on CBS's "60 Minutes" broadcast. In particular, Petitioners introduced evidence that : (1) animal studies are inconclusive regarding whether either Alar or UDMH (Alar's breakdown chemical) is even a *rodent* carcinogen; (2) there is no basis for concluding that low dosages of those chemicals will cause cancer in humans, particularly in light of the absence of any epidemiological evidence linking Alar/UDMH with cancer; (3) Alar is far from being "the most potent cancer-causing agent in our food supply"; indeed, humans regularly consume hundreds of naturally occurring pesticides that are far more carcinogenic than Alar and UDMH were alleged to be by CBS; and (4) there is no basis for concluding that children are more in danger than adults of contracting cancer from apples or that Alar consumption by children will lead to increases in childhood cancer. *See* Petition at 6-8. CBS's opposition brief provides a lengthy overview of the evidence submitted by CBS in support of its summary judgment motion, but CBS does not challenge the Petition's rendition of evidence submitted by Petitioners in opposition to that motion. Of course, for purposes of review of an order granting a summary judgment motion, it is the non-moving party's admissible evidence that must be accepted as true.

Third, not even CBS contends that its broadcast was

true in every detail. Rather, in both its opposition brief and in the courts below, CBS argued merely that the broadcast was "substantially true." *See, e.g.*, Brief in Opposition ("Opp. Brief") at 22, 23, 25. CBS argued, "Under Washington law, a defamation plaintiff cannot prevail merely by pointing to minor inaccuracies in a broadcast that do not alter the 'gist or substance of the report when considered as a whole.'" *Herron v. KING Broadcasting Co.*, 112 Wash. 2d 762, 769, 776 P.2d 98, 102 (1989)." Opp. Brief at 26 n.78. In light of CBS's concession that the "60 Minutes" broadcast might have contained "minor inaccuracies," the Ninth Circuit's failure even to note those inaccuracies and to consider whether they altered the "gist" of the broadcast is highly problematical.

Although CBS's opposition brief makes no attempt to defend the Ninth Circuit's failure to address the substantial evidence of falsity submitted by Petitioners in opposition to the summary judgment motion, CBS does purport to respond to each of the reasons put forward for granting this Petition. Those responses fall far wide of the mark.

CBS appears to have misinterpreted Petitioners' initial argument as an attack on the admissibility of CBS's expert testimony. Opp. Brief at 15-21. Petitioners do not argue that CBS's evidence should have been excluded; rather, they contend that the lower courts misinterpreted Fed. R. Civ. P. 56 in ruling that a jury should not be permitted to pass upon the falsity of a scientific proposition so long as at least some scientific experts believe in good faith that the proposition is true.

CBS also is incorrect in asserting that the Ninth Circuit affirmed based on a ground raised by CBS. Opp. Brief at 21-25. The Ninth Circuit held that CBS was entitled to entry of judgment because the evidence demonstrated that every statement in the "60 Minutes" broadcast was literally true and Petitioners had failed to provide sufficient evidence that *any* statement in the broadcast was false. As

CBS's brief makes clear, CBS has relied not on the literal truth of all statements in the broadcast but on their "substantial truth." *Id.* at 23. A claim of "substantial truth" admits the possibility of minor falsehoods but argues that such falsehoods are inconsequential because they do not alter the gist of the statement when considered as a whole. In order to meet CBS's claim of substantial truth, Petitioners were required to focus their arguments on the overall message of the CBS broadcast. Thus, in affirming the grant of summary judgment on the basis of the alleged literal truth of every statement in the broadcast, the Ninth Circuit relied on a ground not raised by CBS; indeed, a ground inconsistent with CBS's position that its broadcast might contain some inaccuracies but was nonetheless substantially true when considered as a whole. Petitioners ask the Court to hear this case in order to decide whether Rule 56 prohibits entry of summary judgment based on a ground not asserted by the moving party.

CBS also errs in asserting that the Ninth Circuit did not invoke the First Amendment in affirming the grant of summary judgment. The appeals court justified its ruling against libel-by-implication tort liability by stating that the possibility of such liability would create "uncertainty" among publishers and that "such uncertainty raises the spectre of a chilling effect on speech." Pet. App. 15a-16a. The reference to libel law's potential "chilling effect on speech" is a staple of First Amendment jurisprudence and, within the context of the Ninth Circuit's decision, is an obvious reference to First Amendment speech protections. The Ninth Circuit's First Amendment ruling is in direct conflict with the decisions of two other federal appeals courts and merits review by this Court.

I. CBS'S *DAUBERT* ARGUMENT RESPONDS TO AN ARGUMENT NOT RAISED BY PETITIONERS

A substantial portion of CBS's brief is devoted to

responding to an argument not raised by the Petition. *See* Opp. Brief at 15-21. At the same time, CBS has failed to respond to the argument that Petitioners did raise.

CBS apparently misunderstood the basis of Petitioners' citation to the Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). *Daubert* addressed the standards to be applied by district courts under the Federal Rules of Evidence in determining whether expert testimony is admissible as evidence. Interpreting Petitioners' citation to *Daubert* as an attack on the admissibility of the testimony of its experts, CBS argues: (1) Petitioners waived that argument by failing to raise it in the Ninth Circuit; and (2) the expert testimony should not be excluded because it was reasonable for CBS's experts to rely on rodent studies in reaching their conclusions regarding Alar's human carcinogenicity. Opp. Brief at 16-18.

Contrary to CBS's assertions, the Petition raises no issues regarding the admissibility of expert testimony under the rules of evidence. Rather, Petitioners cited *Daubert* for the proposition that the essence of any scientifically valid methodology is that its conclusions can be tested and determined to be true or false. Petition at 18 (citing *Daubert*, 113 S. Ct. at 2797). The lower courts rejected this central tenet of *Daubert* when they indicated that a scientific proposition can never be proven false (and thus is not a proper subject for jury deliberation) so long as there is sufficient uncertainty about the proposition that reasonable scientists could disagree regarding its truth or falsity.

Petitioners cited *Daubert* to make clear that normal Rule 56 standards are not altered simply because the issues in dispute involve complex scientific questions. Rather, as Petitioners have consistently argued throughout this case, their introduction of a great body of evidence as to the falsity of the "60 Minutes" broadcast precluded entry of

summary judgment for CBS under Rule 56.[1] The Court should grant the Petition in order to review the application of Rule 56 to complex scientific questions.

CBS confines its entire discussion of Rule 56 to a single footnote. *See* Opp. Brief at 21 n.70. CBS argues that entry of summary judgment was proper under Rule 56 because "disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *Id.* (quoting *T.W. Elec. Serv., Inc. v. Pacific Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987). Suffice to say that the evidence of falsity cited in the Petition (at 6-8) and not contested by CBS constitutes far more than a dispute "over irrelevant or unnecessary facts."

Nor can CBS avoid the strictures of Rule 56 by arguing that "[t]his lawsuit merely concerned risk assessment -- . . . that is, the likelihood of harm to humans or the environment," and thus that "the debate over Alar's risks was a political dispute" rather than a factual dispute. *Id.* at 20-21 n.69 (citations omitted). To the contrary, this case turns on the truth or falsity of factual assertions contained in the "60 Minutes" broadcast -- including the assertion that Alar is "the most potent cancer-causing agent in our food supply." Given the overwhelming evidence of the falsity of that assertion, entry of summary judgment for

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[1] CBS's waiver argument is without merit. Petitioners' Ninth Circuit brief argued repeatedly that the district court had misapplied Rule 56 in granting summary judgment to CBS. That Petitioners did not cite *Daubert* in the Ninth Circuit in support of that argument is of no moment.

CBS is correct that Petitioners cited *Daubert* in the district court in support of their motion to strike the testimony of CBS's expert witnesses. Brief in Opposition at 15. However, Petitioners did not appeal the denial of that motion to the Ninth Circuit and do not seek to revive the motion before this Court.

CBS was inappropriate.[2]

CBS complains that Petitioners should not have cited to a very recent non-record National Research Counsel study (*see* NRC, *Carcinogens and Anticarcinogens in the Human Diet* (Feb. 1996)) that debunks the notion that Alar is a potent cancer-causing agent. Opp. Brief at 16 n.57. While we can understand why CBS would be unhappy to have the study (issued by a 20-member panel of the NRC) brought to the Court's attention, it is precisely the type of authoritative scientific study that the Court routinely takes notice of. *See* Wright, Miller & Cooper, *Federal Practice and Procedure*, § 4036 at 34-35 (1985). The NRC is an arm of the National Academy of Science, a government body founded by Congress in 1863 to investigate scientific and artistic matters. *See* 36 U.S.C. §§ 251 *et seq.*[3] In any event, the NRC study does not state anything that is not already in the record; Petitioners' experts arrived at the same conclusions in their affidavits.

Finally, CBS repeatedly argues that Petitioners failed

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[2] CBS's citation to a seminal article by Dr. Bruce Ames to support the "substantial truth" of the broadcast's "most potent" allegation is highly disingenuous. *See* Brief in Opposition at 26 n.80 (citing L.S. Gold, B. Ames, *et al.*, "Rodent Carcinogens: Setting Priorities," 258 *Science* 261, 262-64 (1992). The major thrust of that article was that policymakers should be less alarmed about the presence of potentially-carcinogenic synthetic chemicals in our food supply, because numerous chemicals that are present naturally in the food supply have been shown in rodent tests to be far more carcinogenic than any chemicals added by man to the food supply. The article included Alar/UDMH on a list of potentially-carcinogenic synthetic chemicals *not* for the purpose of warning of the dangers of Alar but to demonstrate that synthetic chemicals such as Alar pose a far lower human cancer risk than do numerous naturally-occurring substances.

[3] Ironically, CBS itself cites to a non-record NRC report. Opp. Brief at 18 n.64 (citing NRC, *Issues in Risk Assessment* (1993)).

to offer evidence that Alar is safe. *See, e.g.*, Opp. Brief at 13. CBS notes that Petitioners' experts stated that they could not prove to a scientific certainty that Alar does not cause cancer in humans. *Id.* at 13 n.49. But in order to withstand summary judgment, Petitioners are under no obligation to prove to a scientific certainty that Alar is safe. Rather, they need only prove by a preponderance of the evidence that statements included in the "60 Minutes" broadcast (such as that Alar is the "most cancer-causing agent in our food supply") are false. Unfortunately, the Ninth Circuit appears to have fallen prey to CBS's efforts to impose on Petitioners an unwarranted burden of proving Alar's safety to a scientific certainty. *See, e.g.*, Pet. App. 13a. The Court should grant review to correct this clear distortion of Rule 56.

II. THE NINTH CIRCUIT AFFIRMED BASED ON A GROUND NOT RAISED BY CBS

Petitioners also ask the Court to grant review to resolve an issue that has divided the appeals courts: whether Rule 56 permits entry of judgment for a party on the basis of an argument not raised by the moving party. CBS does not dispute that the lower courts are in need of guidance on this issue. Rather, its sole response is to argue that it did, in fact, raise the argument relied on by the Ninth Circuit in affirming the grant of summary judgment. Opp. Brief at 21-25.

CBS's argument is without merit. The Ninth Circuit held that CBS was entitled to entry of summary judgment because the evidence demonstrated that every statement in the "60 Minutes" broadcast was literally true and Petitioners had failed to provide sufficient evidence that *any* statement in the broadcast was false. Pet. App. 10a-13a. That holding bears little resemblance to the arguments raised by CBS in the courts below or in this Court. Given the strong evidence that statements in the broadcast (particularly the "most potent" statement) were not literally true,

CBS has argued alternatively that such statements were at least "substantially true." As note above at 2, a statement containing minor inaccuracies can still qualify as substantially true (and thus unactionable under Washington law) if the inaccuracies do not alter the gist of the statement when considered as a whole. *Herron*, 112 Wash. 2d at 769.

But one searches the Ninth Circuit's opinion in vain for any discussion of the overall "gist" of the "60 Minutes" broadcast or whether the statements alleged by Petitioners to be inaccurate have any effect on that "gist." Rather, the Ninth Circuit overlooked CBS's concession that the "most potent" statement was not literally true and affirmed summary judgment on the basis of literal truth. The Ninth Circuit's decision is in direct conflict with the D.C. Circuit's decision in *McBride v. Merrell Dow and Pharmaceuticals*, 800 F.2d 1208 (D.C. Cir. 1986), which held that Rule 56 does not permit entry of summary judgment against a party not on notice of the need to marshall evidence with respect to the ground upon which summary judgment is to be granted. Petitioners had no reason to focus their attention on the literal truth of individual statements in CBS's broadcast when CBS itself was focusing on the "gist" of the entire broadcast and was seeking summary judgment on the basis of "substantial truth."

III. THE NINTH CIRCUIT'S FIRST AMENDMENT RULING CONFLICTS WITH RULINGS FROM TWO OTHER CIRCUITS

Despite CBS's protests, one cannot seriously dispute that the Ninth Circuit's libel-by-implication ruling has strong First Amendment underpinnings. The Ninth Circuit held that a literally true statement can never be actionable in tort because a contrary rule "raises the spectre of a chilling effect on speech." Pet. Ap. 15a-16a. CBS is correct that the appeals court never mentioned the First Amendment by name, but the "chilling effect" language is an obvious appeal to First Amendment values. A federal

appeals court has no mandate to adopt its own set of prudential rules governing a state-law product disparagement action, so the "chilling effect" discussion could only be a reference to the First Amendment. Indeed, this Court has often used the phrase "chilling effect" in its discussion of First Amendment limitations on libel actions. *See, e.g., Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986)("[S]uch a 'chilling effect' would be antithetical to the First Amendment's protection of true speech on matters of public concern.") Indeed, it would have been surprising if the Ninth Circuit had *not* addressed any First Amendment issues, given that significant portions of both parties' Ninth Circuit briefs heavily emphasized First Amendment issues.

CBS notes that the Ninth Circuit also based its libel-by-implication ruling on its interpretation of Washington state law. But the appeals court cited no Washington Supreme Court decisions but rather relied on a single libel-law decision from the Washington Court of Appeals. CBS is simply incorrect that the Ninth Circuit's interpretation of Washington state law is not subject to review by this Court. Opp. Brief at 28 n.86. The Court has not hesitated to review the lower federal courts' interpretation of state law where it reflects plain error. *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833, 880 (1991).[4] Moreover, the Ninth Circuit gave no indication that it believed that its state-law rationale provided sufficient grounds by itself to reject liability under a libel-by-implication theory; indeed, the court would not have needed to reach the First Amendment issue had it so believed. When a *state court* opinion purports to rely on both state and federal grounds, the Court has felt free to review the decision unless the opinion includes a "plain

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[4] As the Petition noted (at 27 n.18), the Ninth Circuit decided the libel-by-implication issue without the benefit of briefing and simply ignored contrary precedent from the Washington Supreme Court.

statement" that the state court is relying on state law. *Illinois v. Rodriguez*, 497 U.S. 177 (1990). Federalism concerns are not at issue in cases, as here, on review from a federal court; thus, the "plain statement" rule suggests that the Ninth Circuit's citation to state law is no impediment to review of the Ninth Circuit's First Amendment ruling.

The Ninth Circuit's ruling that the First Amendment prohibits libel-by-implication liability is in clear conflict with decisions from the Fourth and D.C. Circuits. There is no merit to CBS's contention that those two decisions were based on state law rather than the First Amendment. Indeed, not only did the Fourth Circuit base its decision explicitly on First Amendment grounds, it also cited the D.C. Circuit's decision as support for its First Amendment rule. *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092-93 (4th Cir. 1993)(citing *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)

Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Counsel for Petitioner

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